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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 46

[redacted]

vs.

[redacted]

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

Petition for certiorari filed [redacted]

Certiorari granted [redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 46

LEO CASSELL, PETITIONER,

vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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IN CRIMINAL DISTRICT COURT NO. 2, OF DALLAS COUNTY, TEXAS

INDICTMENT—Filed November 18, 1947

A True Bill

In the name and by the authority of the State of Texas, The Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 2, of Dallas County, at the October Term, A. D. 1947, of said Court that one Lee Cassell on or about the 22nd day of September in the year of our Lord One Thousand Nine Hundred and 47 with force and arms, in the County and State aforesaid, did with malice aforethought kill Lester Linwood Wilson by hitting, beating and striking him with a piece of pipe; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

(S.) Frank Rigney, Foreman of the Grand Jury.

Will R. Wilson, Jr., Criminal District Attorney of Dallas County, Texas.

[fol. 5] Copy

IN THE CRIMINAL DISTRICT COURT NO. 2, OF DALLAS COUNTY

No. 3900-B

STATE OF TEXAS

VS.

LEE CASSELL

MOTION TO QUASH INDICTMENT

To the Honorable Judge of said Court:

Now comes Lee Cassell, defendant in the above entitled and numbered cause, and moves the court to quash the indictment in this cause, for the following reasons, to-wit:

1

Because the said indictment is vague, ambiguous, not specific and that the offense is not charged in plain and in-

telligible words, sufficient to put defendant upon notice of what he is charged with, and an opportunity to legally defend himself therefrom, and said indictment filed in this cause does not allege a violation of the law.

2

The indictment in this cause should be quashed for the reason that said indictment states and alleges "that one Lee Cassell on or about the 2nd day of September in the year of our Lord One Thousand Nine Hundred and 47 with force and arms, in the County and State aforesaid, did with malice aforethought kill Lester Linwood Wilson by hitting, beating and striking him with a piece of pipe;" that the manner, method or the character of the piece of pipe are not sufficiently described as to furnish this defendant with information of a nature required that he might properly defend himself against the charges and does not allege a violation of the law. Webster's N-w Standard Dictionary defines a pipe as "1. Musical instrument consisting of a long tube. 2. Any long tube. 3. Tube of clay, etc., with a bowl at one end for smoking tobacco. 4. Cask containing about one hundred and twenty-six gallons. 5. Peeping, whistle, or chirping of a bird." There is no definition in the dictionary as to what a piece of pipe would be; and there is no language used in the indictment that would appraise this defendant as to what kind or character of pipe he was charged with using, said indictment does not allege a violation of the law.

[fol. 6] 3

That the allegations in said indictment that Lee Cassell did with malice aforethought kill Lester Linwood Wilson by hitting, beating and "striking him with a piece of pipe" does not allege the kind and character of the weapon or instrument used, and does not aver that it was unknown to the Grand Jury and is therefore an insufficient allegation of the kind and character of the weapon or instrument used in the killing of the said Lester Linwood Wilson and under the constitution of the United States and of Texas and of the penal code of Texas and under the Code of Criminal Procedure of Texas, this defendant is entitled to have this information set out in the indictment against him, that is such a description of the kind and character of the weapon or instrument used, in ordinary and concise language in such a manner as

to enable a person of common understanding to know what is meant, and with that degree of certainty that would give the defendant notice of the particular offense of which he is charged, as set out in Art. 405 of the Code of Criminal Procedure of Texas; and in this connection defendant alleges that he is a person of ordinary understanding, and that he does not understand the meaning of "piece of pipe" as used in the indictment, and that no other person of common understanding would know what is meant; and in this connection he further alleges that no one knows what is meant, not even the most brilliant scholar or learned professor in a university would *not* know what is meant by piece of pipe.

4

That defendant is a negro and is charged with the murder of Lester Linwood Wilson, a white man; that no negroes were placed on the Grand Jury which indicted him, and that there are and were from five thousand to ten thousand adult male negroes, resident citizens of Dallas County, Texas, who are and were qualified jurors, and who were qualified to sit as Grand Jurors, being about one-seventh of the jury population of Dallas County, Texas; that the jury commissioners appointed by the court were all white men; that in selecting the grand jury they drew no negroes on said grand jury, and in this connection they discriminated against them in the formation of said grand jury, and thus denied him the equal protection of the law, which is guaranteed him under the Fourteenth Amendment to the Constitution of the United States and the decisions thereunder.

[fol. 7] Wherefore, defendant prays the court that the indictment filed in this cause be quashed, set aside and held of no effect and that the defendant be discharged, and he prays for general relief, and he will ever pray.

(S.) W. E. Pinkston, Attorney for defendant.

203 S W 2nd 206.
186 S W 2nd 243.
189 S W 271.
36 Tex. 352.
Art. 405 C C P.

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77 S W 453 Fourteen Amd.

[fol. 8] IN CRIMINAL DISTRICT COURT NO. 2, DALLAS COUNTY

[Title omitted]

STATE'S CONTROVERTING AFFIDAVIT TO DEFENDANT'S MOTION TO QUASH INDICTMENT—Filed January 5, 1948

Now comes the State of Texas, acting by and through its duly elected, qualified and acting Criminal District Attorney, and files this, its Controverting Affidavit to Defendant's Motion to Quash the Indictment in the hereinbefore numbered and styled cause;

In paragraph 4 of Defendant's Motion, he alleges that no negroes were placed on the Grand Jury which indicted him and that, in this connection, the white jury commissioners appointed by the Court discriminated against the Defendant in the selection of said Grand Jury and thus denied him the equal protection of the Law.

The State denies that there was any discrimination on the part of the said Grand Jury Commissioners in naming the panel from which members of the Grand Jury which indicted the Defendant were chosen.

The State further claims that nowhere in his Motion does the Defendant show any discrimination which he claims was exercised.

In support of this controverting affidavit, the State would further show that practically all of the Grand Juries which have served in Dallas County, Texas, since the rendering of the Opinion in Hill vs. The State of Texas by the Supreme Court of the United States, have had at least one negro Grand Juror, respectively, on them;

The State of Texas would further show that of the Grand Juries which served during the years 1946 and 1947, there were a total of 108 men on such Grand Juries, of which total five (5) were members of the colored race; further that the Commissioners which selected the Grand [fol. 9] Jury which indicted the Defendant were all instructed by Judge Henry King, Criminal District Court, No. 2, Dallas County, Texas, in which Court the said Grand Jury returned this indictment, that they should exercise no discrimination against any person or group of persons because of race, color, creed or religion; that all of the said Grand Jurors heard and abided by such instruction.

Wherefore, premises considered the State of Texas prays that the Defendant's Motion to quash this indictment in the above styled and numbered cause be overruled in all respects.

Will R. Wilson, Criminal District Attorney, Dallas County, Texas, by (S.) Douglas E. Bergman, First Assistant.

Subscribed and sworn to before me, the undersigned authority, on this, the 5th day of January, A. D. 1948. (S.) Cecil J. Lowrance, Notary Public, Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 10] IN THE CRIMINAL DISTRICT COURT, No. 2, DALLAS COUNTY, TEXAS, JANUARY TERM, 1948

No. 3900-B

THE STATE OF TEXAS

vs.

LEE CASSELL

Statement of Facts

Monday, January 5th, 1948.

APPEARANCES

Hon. Will R. Wilson, Criminal District Attorney, Dallas County, Texas; Hon. Douglas E. Bergman, Hon. Waller M. Collie, Hon. Frank Moore, asst. District Attorneys, for the State of Texas.

Hon. W. E. Pinkston, of Dallas, Texas, for the Defendant.

HEARING ON THE MOTION OF DEFENDANT TO QUASH THE INDICTMENT

Be it remembered, that, upon this, the 5th day of January, A. D. 1948, the Hearing on the Motion of the Defendant to Quash the Indictment in the above entitled and numbered cause came on to be heard before his Honor, Henry King, Judge of said court;

That the following is a full, true and accurate Statement of Facts, in narrative form, of all the facts adduced upon the Hearing on the Motion of the Defendant to Quash the Indictment in the above entitled and numbered cause:

(Reporter's Note: All witnesses sworn and rule invoked.)

[fol. 11] S. TINSLEY CHANDLER, the first witness called by defendant, having been first duly sworn, testified as follows, towit:

Direct examination.

By Mr. Pinkston:

My name is S. Tinsley Chandler; I live in and I am a qualified voter in Dallas County, Texas; I am a married man with no children.

In September, 1947, I was called to the Court House by Judge King to help select a Grand Jury Panel for the October Term, 1947; we met 4 or 5 days ahead of time. Myself and the other men appointed then attempted to appoint a qualified group of men to serve as Grand Jurors for the approaching Term, October Term, 1947. My opinion of what are qualified men for Grand Jury Service is, I tried to select men that were reputable businessmen, or reputable citizens in the community of Dallas County, Texas, and that, in my estimation, were fair and impartial men.

I was acquainted with all of the men that I selected. I did not come down and meet all of the other men that were selected. I never did see them in a group. I believe that I submitted 6 names, all of whom I knew personally. None of them were negroes. I knew at that time that they were not negroes.

Cross-examination.

By Mr. Bergman:

When I was called down to serve as Grand Jury Commissioner, I was instructed by Judge King that there was no racial discrimination, not that a negro could or couldn't be selected for the Grand Jury. The Judge did not tell us that we were to discriminate against negroes or Mexicans or any other race; the Judge did not instruct us to put negroes on or leave them off. Myself and the other 2 Com-

missioners were instructed to select 16 qualified men without reference to race or color or any other question like that.

During the course of our deliberations as Commissioners there was a conversation with reference to selecting negroes on the Grand Jury Panel; it was discussed in the Jury Room along we Commissioners that an effort had been made to secure a negro for the Grand Jury; there was an effort made by the other Grand Jury Commissioners.

[fol. 12] There had been several efforts made to secure negroes and this was discussed among the Members of the Commission. I was not personally acquainted with any negro citizen of Dallas County that I thought was qualified to sit on the Grand Jury, at that time. I did not know a one personally that I would recommend, myself, at that time.

No studied or passive effort was made by that Grand Jury Commission to keep a negro from serving on the October Grand Jury. The reason that I did not submit the name of a negro in my 6 names that I submitted was because I did not know any negro citizen that I felt was qualified with reference to education and business ability to serve on this Grand Jury.

The reason that I did not submit a negro's name was not because of his color, or race, or previous condition of servitude in any sense of the word.

Redirect examination.

By Mr. Pinkston:

I have lived in Dallas 15 or 16 years. After Judge King told me to disregard color or creed, I did disregard it.

(Witness excused.)

A. C. Moser, Jr., the next witness called by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is A. C. Moser, Jr.; I have 5 children; I live in Northeast Dallas; I was born here 38 years ago. I know

many people in Dallas of all races, creeds and colors, etc.

On or about October 1st, 1947, I was called and I came to this court room to serve as a Grand Jury Commissioner to select a Grand Jury for the October, 1947, Term. My duties were to select 12 men and several alternates to serve, and we were given instructions by Judge King not to discriminate in any way against any race, creed or anything of that kind, and that we were to select these men with an open mind. That is what I did.

[fol. 13] I selected 12 men along with the 2 Commissioners; there were not any of us to select any certain number; we were to call men, interview them, and talk to them and, then, we were to get together and select them, the three (3) of us, and that's what we did.

We all selected these men. I interviewed about 5 or 6 and, then, when we came down here to make the list, we rechecked them and in some of the cases the men could not serve. I recommended 5 or 6 men. They were all reputable people, of course, and I checked to see that they had not served previously although that was not something to entirely disqualify them. We did not select a negro; I selected 5 or 6 men and they were all white men, and, in my opinion, qualified to be Grand Jurors.

I know some negroes that might be qualified for Grand Jury Service. I selected a negro but I could not get him for this service because he could not serve. I selected 6 reputable men but I did not select a negro.

Cross-examination.

By Mr. Bergman:

Judge King told us when we were called down here that we should consider negroes as well as anybody else. He told us at least 3 times that we were not to be prejudiced against negroes and he said that it was not our duty to put a negro on, that he was not telling us that we had to and that it was up to us entirely; that applies to Mexicans and Italians as well.

I know negro yardmen, negro doctors, and principals of the negro High School; that is who I tried to get on the jury; I called up the Principal of the Lincoln High School in South Dallas and I asked him if he would serve on the Grand Jury; he said that he would be glad to but that his time belonged

to the City Schools and I was to call his boss, Mr. W. T. White, Superintendent of Dallas Schools; I was unable to get Mr. White when I called him twice because they are very busy in October; finally through his Secretary I was told that he just could not spare his Principals during that time. The Principal of Lincoln High School, Melvin, is a negro. This was just about the beginning of the school year.

There was absolutely no studied or passive effort to [fol. 14] discriminate against negroes on this Grand Jury Panel; they took themselves off when we tried to put them on. The reason that a negro was not put on this Grand Jury Panel was not because I had not made an effort to secure one; that is the only reason, as far as I was concerned.

The 3 Commissioners submitted 16 names to Judge King and from them 12 names were to be selected; I knew that 12 men would be finally selected.

Redirect examination.

By Mr. Pinkston:

We did not select a negro when I served as a Commissioner; we did disregard ~~color, race or creed~~; I did not know plenty of negroes that I said would be qualified. I know a lot of negroes that are qualified lawyers, doctors, Superintendents of Schools and that sort of thing but the particular thing is that their occupation precludes their serving. You could not ask a doctor or lawyer to serve 3 months of their time, either white or colored; that limited us as to the number that we could select. I knew a lot of white and colored people that were qualified.

I did not select a negro on this Grand Jury Panel but I tried.

(Witness excused.)

B. F. McLain, the next witness called by the Defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is B. F. McLain; I am with the Hart Furniture Company; I reside in Dallas County, Texas, and I am a

qualified voter therein. I am a man of family; I have lived in Dallas 28 years.

I know many people in Dallas that are qualified voters, among all races and creeds. On or about October 1st, 1947, I was appointed a Grand Jury Commissioner to select a Grand Jury for the October, 1947, Term; I acted in that capacity and we selected men for that Grand Jury; I think that I selected 6 or 7 of the 15 or 16 selected. I never did see that Grand Jury in a body.

I did not know practically every one on that Grand Jury; [fol. 15] I knew the ones that I recommended but I did not know everybody on the Grand Jury. I am in the furniture business. All of the 5 or 6 men that I recommended were white men; I personally, did not recommend any negroes.

As far as I know, there was not a negro on the October, 1947, Term of Grand Jury; I have never seen them in a body. When the information came to me I tried to contact a negro; I am sure that I would have known had a negro been put on there. I did not recommend any negroes.

Cross-examination.

By Mr. Wilson:

The Court pointed out to us what the qualifications were for the Grand Jury, he told us to select men who met those qualifications; he told us that we were not to discriminate because of any race, color or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against any one because of race, color or creed. I know definitely and positively that we did not discriminate; we selected the Grand Jury on the basis of qualification and on no other basis. I don't know whether there were any Jews and Catholics on that Grand Jury; I assume that there were some Protestants because I know some of them. The reason a negro was not selected was not because we discriminated; I only appointed those that I personally knew to be qualified.

Mr. Moser tried to contact a negro over the telephone to get him to serve on Grand Jury; as far as I know Mr. Moser did not get the permission to submit the name of that man; I don't remember the negro's name but he was Principal of the Negro High School here. Mr. Moser put this negro's name in and he discussed his qualifications and said that he would recommend him, and Mr. Chandler and I agreed

that we would be agreeable to join with him in his recommendation, if Mr. Moser could procure him.

I found that some people who were qualified could not serve for various reasons; I had one man whose hearing wasn't so good; another man was going to leave town; it is necessary and advisable to get people not only qualified but who can serve. Some people that I approached said, they could not give one-half a day, 5 days a week for 3 months, so, it was necessary to get people that could serve.

If the name of any qualified negro citizen — been sub-
[fol. 16] mitted at that time, who had given his permission and said that he had time to serve, I certainly would have submitted his name along with the other 15 names, if it was somebody that would have been acceptable to me. With reference to there being any studied or obvious or intention-effort made by the Commissioners to keep a negro from serving on the Grand Jury, I will say that there was absolutely no such effort made.

Redirect examination.

By Mr. Pinkston:

All definite selections were made here in the Jury Room and they were submitted from various and sundry names; we discussed them and we made definite selections there; we made the definite selections together there. I did not make any selections or pick out any man for submission before I was appointed. I submitted my names on the date, unknown to me, when the Commission was down here in this court, the day that the Commission got together down here and we made our selection. I had some names and I came in here and discussed them with the other Commissioners.

I cannot give you the exact date when I selected the names that I wanted to submit and recommend for the Commission to appoint as Grand Jurors but I signed this document and that's a date on there; that's when we met and made definite selection. Before that I had asked some people if they would be available; I came down here and met with the other 2 Commissioners on that date and we selected the Grand Jury Panel.

I did not have occasion to submit any names to anybody before I met with the other 2 Commissioners down here; I had some names in mind. The Commission discussed all

names and we, finally, worked out the Grand Jury Panel. We had our lists with us, all of us, and submitted that list during our discussion.

(Witness excused.)

A. C. PARTEE, the next witness called by the Defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

[fol. 17] My name is A. C. Partee; I live in Dallas; I am Executive Secretary of the Progressive Voters' League; in that capacity I maintain a list of the qualified negro voters in the County of Dallas and City of Dallas; I have that list with me.

I have never counted that list; I have approximated the names on that list.

Voir dire examination.

By Mr. Wilson:

I have compiled a list of qualified voters each year here in Dallas County; it is a Poll Tax List of the negro Poll Tax payers. I don't know where this list comes from: it comes out of the office of the Tax Assessor and Collector; I didn't secure it. This list does not have any mark of distinction as between colored and white Poll Tax payers. It is a breakdown of all of the negro voters, taken from the Master Files. The Poll Tax List has the race; generally have "C", or "Brown", "Colored" or "Negro" on there; all that have "C" or "Brown" are taken from that List. Sometimes we pick up a lot of people's names not on the List because whoever made up the Poll List, probably, forgot to fill in the space. This List shows the qualified negro voters for each Precinct. I don't know who got those lists; year before last the List was brought to my office. I keep a record of the number of negro voters in relation to white voters and the total is such and such; I make an attempt to break it down.

I know that my list is accurate as far as the neighborhood of where our people live and work. When we get out of the negro areas, I don't know very much about it; for instance,

there may be a negro living in a Servant's House of your house. I do know about that in Precincts where negroes live because it has the addresses and everything and the house number. I do know a lot of those people personally.

Men and women are al- together on this list, husband, wife, father and son and daughter, whoever lives in the same household; the vote figure that I have is not broken down between men and women. I have no way of know- the percentage between men and women but I would say that it is about 50-50. I am sure that the Tax Collector would, probably, have all of that.

[fol. 18] Direct examination (con'td).

By Mr. Pinkston:

I have checked many of the voters on the list of negro voters in Dallas County that I have. After lists are checked, names counted, etc., I would roughly estimate that the male adult voting strength of the negro race in Dallas County is about 5,500.

Cross-examination.

By Mr. Wilson:

That figure includes both Poll Tax payers and Poll Tax Exemptions both. I am testifying that they are eligible and hold Poll Taxes only, and I know that we have more qualified voters than is on the List here because I have had some personal knowledge of some errors.

With reference to other qualifications entering into Grand Jury service than Poll Tax holders, my testimony is that I estimate that, including Exemptions, there are some 5,500-colored Poll Tax payers in Dallas County.

Redirect examination.

By Mr. Pinkston:

Had a negro been selected on the Grand Jury for October Term, 1948, I would have known about it in about a week's time. I do know of my own knowledge that there are some negroes in Dallas County qualified to serve on the Grand Jury; they were listed among my List of negro voters.

Recross-examination.

By Mr. Wilson:

I know the names of negro men who have served on the Grand Jury; Travis Clark, S. W. Hudson, Jr., W. Barton Beatty, Jr., T. W. Pratt, C. F. Starks. I know Joe Debies, 1315-East 8th Street; I don't know for sure about him having served on Grand Jury; I know of James Dixon, 3405-State Street; that address is colored; I don't recall at the present time that he served on Grand Jury.

Travis Clark is a negro and he served on the Grand Jury; Samuel Hudson is a negro and he served on the Grand Jury. I don't know J. King, of Grand Prairie; I don't know Charles D. Johnson, Carrollton, but I have heard of him; I know he is a negro that served on Grand Jury. I don't know W. J. Sheppard, Mesquite. I do know T. W. Pratt, [fol. 19] 3612-Thomas, who served on Grand Jury. I know C. A. Walton, 3701-Oakland; I have probably forgotten but, probably, he served as Grand Juror. I know that he is a negro.

I don't know about Bonnie Johnson, 4339-Fairfax; I don't know him. I know William M. McShann, from Alpha; he is a negro and I think he served on Grand Jury. I don't know Vernie Flowers, 2607-San Jacinto. I know LaFayette M. Turley, 3608 Allen; he is a negro and he served on Grand Jury. I don't know Milton Grace, 4226-Cabell. I know William Barton Beatty, Jr., a negro, that also served on Grand Jury. I know also Clarence F. Starks, a negro, who served on Grand Jury.

All that I know served on Grand Jury are: C. F. Starks, W. B. Beatty, Jr., S. M. Hudson, Jr., T. W. Pratt, L. M. Turley. I know that those served. Those that I testified to last I know personally; the others I don't know.

Redirect examination.

By Mr. Pinkston:

I did not personally see any of those men on Grand Jury in the Grand Jury Room.

(Witness excused.)

BEN F. GENTLE, the next witness called by the Defendant, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is Ben F. Gentle; I am Tax Assessor & Collector of Dallas County, Texas; my term started October 8th, 1947. I am familiar with the tax records. I do not now have a record of segregated white and colored Poll Tax Holders; they are shown on list as white or colored but I don't have the number as to how many.

There are some Precincts that are practically all negroes.

Cross-examination.

By Mr. Bergman:

I have served on a Grand Jury in Dallas County one 3-[fol. 20] months term; there was a negro on that Grand Jury, January Term, 1946, I believe, I believe that his name was Sam Hudson.

(Witness excused.)

The defendant rests.

MILLARD SWEATT, the first witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is Millard Sweatt; I am a Special Investigator for District Attorney, Dallas County, Texas. I have this date made an investigation of the Grand Jury Records of Dallas County, which are under the control of the District Attorney, with reference to the number of negroes who have served as Grand Jurors for Dallas County since 1942. Those records indicate or reflect the negroes who have served on the various Grand Juries impaneled by the Criminal District Courts of this county since 1942. Negro Grand Jurors have "Colored" behind the names.

From my examination of those records I have prepared a List of the names, addresses and terms of court at which negroes have served on Dallas County Grand Juries since 1942. (Marked State's Exhibit "A"). This List started with October Term, 1942, up through the last term of Grand Jury, 1947.

(Witness excused.)

HENRY KING, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

I am Judge Henry King, Judge, Criminal District Court, [fol. 21] No. 2, Dallas County, Texas, and I have served now 11 years and 5 days.

I tried and I am familiar with the case of Hill vs. The State, which went up from Dallas County around 1942, on the question of negroes not being on Grand Juries. Subject to the opinion of the Supreme Court in 1942, in the Hill Case, with reference to whether I, from my own knowledge, know whether negroes have been on each Grand Jury empaneled in the two (2) Criminal District Courts of this county, subsequent to that time, I will say that, except for a short lapse of time, I was present at every empaneling of the Grand Jury in Dallas County. As you know, we alternate on Grand Juries—Criminal District Court, across the hall, will empanel one Grand Jury and this court, Criminal District Court, No. 2, will empanel the next one, and the Judges sit with each other as a rule, with few possible exceptions, and Judge Grover Adams was on the bench across the hall after I got that opinion and, as I recall, I have been present at every empanelment with the possible exception of about three (3), and that was during the period of the War. I left here in September, 1943, as I recall, and I arrived back here in July, 1944, as I recall.

The Grand Jury had already been picked for the October Term, but I wasn't here for the empanelment of it. Then, I missed the July Term, 1944, and I know, after the Hill Case was returned, I empaneled the next Grand Jury after that,

and I know that there was a negro on that Grand Jury and, as I recall, with the exception of three (3) and not to exceed four (4), to my knowledge, has there been a Grand Jury here that has not had a man of the negro race on the Grand Jury.

One of those Grand Juries was for October Term, 1943; I wasn't here then; and the June Grand Jury of 1944, I wasn't here and, then, I remember, there was one other Grand Jury that didn't have a negro on it; that is the Grand Jury that just went out, October Term, 1947, Grand Jury. As I recall, the Grand Jury before the October Grand Jury, 1947, did not have a negro, so, that would make two (2) that I know definitely that there was no negro on the Grand Jury and two (2) that I don't know about.

At the Grand Jury Term preceding the October Term, 1947, Grand Jury, which indicted this Defendant, two (2) Grand Juries were empaneled, one for each Criminal District Court, for the July, 1947, Term, and I think that there was a negro on one of those two (2) Grand Juries. I am [fol. 22] sure that there was a negro on one of the July Term, 1947, Grand Juries.

Prior and subsequent to the handing down of the opinion in the Hill Case, when I was charging Grand Juries I would tell them that there should not be any discrimination made on account of race, creed or color, or religion, and I particularly instructed them about the Hill Case. As a matter of fact, I explained the Hill Case to them and told them about it.

I gave instructions to the Grand Jury Commissioners that selected the October Term, 1947, Grand Jury that indicted this Defendant, both individually and collectively, with reference to negroes serving on that Grand Jury.

Cross-examination.

By Mr. Pinkston:

There was not a negro on the October, 1947, Term Grand Jury that indicted this Defendant. I don't know that the Commissioners disregarded my instructions but they didn't put a negro on. The Commission did not fail to put a negro on that Grand Jury after my specific instructions; I never have instructed any Grand Jury Commission to put any negro on a Grand Jury, or a Catholic, or any religion, or a person of any nationality, even though they were American citizens; I have never instructed them to put anybody on there any more than never to tell them to put "John Doe"

on there; but I have told them what the case held in the Hill Case; I have always told them what the Constitution says with reference to discrimination against a person because of race, politics, religion or color. It is not my duty to tell them to put them on or not to put them on.

With reference to your wanting it in the record that, after my instructions, they failed and refused to put a negro on, I will say, I cannot answer that; I wouldn't say that they refused. I will answer that they didn't put one on there; there wasn't one on there, after I had instructed them what their duties were with reference to discrimination.

(Witness excused.)

[fol. 23] MILLARD SWEATT, the next witness, recalled by The State of Texas, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

These are the Grand Jury Docket Books; No. 1 is for 1941 on through 1943 and 1944; Book No. 2 is 1944 through 1946; No. 3 Book is to begin at December, 1946 and also reads "1947 through 1949". On page 445, Grand Jury Book, 1941 through 1944, there is a list of the January Term, 1943, Grand Jury; it shows that Charles D. Johnson, a negro, served on Grand Jury, from Carrollton, Route 1. On page 491 of same book, April Term, 1943, Grand Jury appears; it shows that W. J. Sheppard, Route 3, Box 14, Mesquite, Texas, a negro, was on the Grand Jury for that term.

In this same book, page 531, there appears the Grand Jurors for July Term, 1943, which include a negro citizen, T. W. Pratt, 3612—Thomas. On page 617, same book, there appear Grand Jurors for January Term, 1944, including C. A. Walton, a colored man, 3711—Oakland Avenue.

In this book, 1944 through 1946, I find list of Grand Jurors for April Term, 1944, page 33, including Bonnie Johnson, colored, 4339—Fairfax.

On page 83, same book, I find the list of Grand Jurors for July Term, 1944, including William McShann, colored, of Alpha, Texas.

On page 139 of this book, I find list of Grand Jurors, October Term, 1944, which includes Vernie Flowers, 2607—San Jacinto.

On page 186 of this book, I find list of Grand Jurors, January Term, 1945, which include the name of LaFayette M. Turley, colored, 2638—Allen Street.

On page 247 of this book, I find list of Grand Jurors for April, 1945, Term, which includes Milton Grace, colored, 4226—Cabell, Dallas.

On Page 308 of this book, I find list of Grand Jurors for July 1945, Term, which includes William Barton Beatty, Jr., colored, 3512—Myers, Dallas.

On Page 379 of this book, I find list of Grand Jurors for October 1945 Term; it shows Clarence F. Starks, colored, 2431—Caddo St., Dallas.

On page 426 of this book, I find list of Grand Jurors for [fol. 24] January 1946 Term, which includes Wheeler Hardaway, colored, 3810—Weiner, Dallas.

On Page for July term, 1946, Grand Jurors in this book I find the name of Joe Dedies, page 563; this man lives in a colored district on East 8th Street, known to be a colored part of City of Dallas.

On Page 1 of this (indicating book, 1947 through 1949, I find a list of Grand Jurors for October Term, 1946; the name of James Dixon, colored, 3405—State Street, appears thereon.

On Page 54 of this book I find a list of the Grand Jurors for the January Term, 1947, among whom is Travis Clark, colored, 1809—Washington, Dallas.

On Page 182 in this book I find the names of the Grand Jurors for the July Term, 1947, which includes the name of Sam Hudson, Jr., colored.

Cross-examination.

By Mr. Pinkston:

I have been employed by the District Attorney since May, 1947; I do office work and outside investigating work. I did not write in these Grand Jury records here at all; somebody else has custody of these books; they are accessible to any one wanting to check them in Grand Jury Room; somebody else writes in these books and the employees of District Attorney's Office are Custodian thereof. I did not see them written in here.

Of my own knowledge, I couldn't say why a word or something was put opposite somebody's name; I didn't see that put there and I don't know who put it there except that it

was put there for the express purpose of showing that they were colored people. I don't know what was in somebody else's mind.

(Witness excused.)

WILL R. WILSON, JR., the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is Will R. Wilson, Jr.; I am the present District [fol. 25] Attorney, Dallas County, Texas; I took office January 1st, 1947.

I have heard Mr. Sweatt's testimony; those books are the records of the Dallas County Grand Jury containing a list of the people serving on the Grand Juries for each of those Terms and a record of the cases heard by the Grand Jury, showing the name of the Defendant, the offense with which he is charged, the date of the hearing and the action of Grand Jury. These are a record of my office and they are kept under my supervision and they are kept by an employee of my office.

The books covering the period from 1943 to 1946, inclusive, were turned over to me by Dean Gauldin when I assumed office, January 1st, 1947; that is the identical book which was turned over to me at that time. The book designated as Grand Jury Docket Book 1944-1946 is a record of the Grand Jury as turned over to me by Dean Gauldin, my predecessor, when I took office January 1st, 1947. This book identified as Grand Jury Docket Book for years, 1947 through 1949 and October and December, 1946, with the exception of those entries in that book which appear to have been made for October to December period in 1946, those other entries have been made by my employees under my supervision and control.

Cross-examination.

By Mr. Pinkston:

I did not personally make any entries in these books; my agents and employees in my office made them all. I don't

know who made the entries under former administration. Those, like other records, were all delivered to me when I took office and I then assumed custody of them. I don't know who made them. I had no supervision over any of those records before I took office; I had nothing whatsoever to do with these records before January 1st, 1947.

I have been in the Grand Jury Room when entries were being made in these books for 1947 record; I have seen the employee of my office working on them. I could not testify as to any independent entry.

Redirect examination.

By Mr. Bergman:

These are the official records of the Dallas County Grand Juries for the years indicated on the back; they are books of original entry. With the exception of the Bills of Indict-
[fol. 26] ment, these are the only records of the Dallas County Grand Juries for the years indicated; outside of the stenographic records of Grand Jury proceedings, these are the only records.

There have been negroes empaneled on the Grand Juries since I assumed office January 1st, 1947, as District Attorney; I can't say how many; I can say that I have appeared before all of the Grand Juries since that time and that I have independent knowledge and recollection of the fact that there was a negro on the January, 1947, and the Summer, 1947, Grand Juries. I have been before all of the Grand Juries and I have seen negroes on the January and July, 1947, Term Grand Juries.

Recross-examination.

By Mr. Pinkston:

I am not in the Grand Jury Room often, only when I go on some special matter. I occasionally visit with the Grand Juries in the routine operation of their business.

My testimony is that I have been before all of the Grand Juries and that I have independent recollection of negroes being on two (2) of them. I don't remember whether there were negroes on the others or not.

(Witness excused.)

The State rests.

Defendant closes.

(Reporter's Note: Case reopened by The State of Texas.)

BILLY G. BURDEN, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is Billy G. Burden; I am Clerk of Criminal District Court, No. 2, Dallas County, Texas.

[fol. 27] I have a record of the Minutes of the court showing the names of Grand Jurors empaneled for the October Term, 1942, until October Term, 1947, Grand Juries. For October Term, 1942, the name of J. King appears as a member of Grand Jury for October Term, 1942. For January, 1943, Term the name of Charles D. Johnson appears. These are official records of the District Clerk of Dallas County, Texas, and they are kept by me.

The records of January, 1943, Term Grand Jury are in the other court which are in that (indicating) stack; (witness looks) Yes; it appears therein. My testimony is based on the records of both Criminal District Court and Criminal District Court, No. 2, Dallas County, Texas. These are the Official Minutes.

W. J. Sheppard appears in the Minutes for April, 1943, Term; the name of T. W. Pratt appears as a member of the July, 1943, Term Grand Jury; the name of C. A. Walton appears as a member of the January, 1944, Term, Grand Jury; the name of Bonnie Johnson appears as a member of the April Term, 1944, Grand Jury; the name of William McShann appears as a member of the July Term, 1944, Grand Jury; the name of Vernie Flowers appears as a member of the October, 1944, Grand Jury; the name of LaFayette M. Turley appears as a member of the January, 1945, Grand Jury; the name of Milton Grace appears as a member of the April Term, 1945, Grand Jury; the name of W. Barton Beatty, Jr., appears as a member of the July Term, 1945, Grand Jury; the name of Clarence F. Starks appears as a member of the October Term, 1945, Grand Jury; the name of Wheeler Hardaway appears as a member of the January, 1946, Grand Jury; the name of Joe Dedies appears as a member of the July, 1946, Term of the Grand

Jury; the name of James Dixon appears as a member of the October, 1946, Term Grand Jury; the name of Travis Clark appears as a member of the January, 1947, Term of Grand Jury; the name of William Hudson, Jr., appears as a member of the July, 1947, Term of Grand Jury; it is as Samuel Hudson.

I have been testifying from the Minutes of the two (2) Criminal Districts Courts of Dallas County, Texas, which records are under my control and supervision as Deputy District Clerk.

Cross-examination.

By Mr. Pinkston:

I have been in present position since January 1st, 1947; [fol. 28] I am not wholly the custodian of the records of Criminal District Court; there is another party who has charge of them; I have seen some of his records made.

I do not have custody of the books across the hall in Criminal District Court, Dallas County, Texas, but I have the authority to handle records in both of these courts. I am custodian of the records of both courts; the Clerk across the hall prepares the records; he has jurisdiction; that Clerk is equally Custodian of the records in both courts. He does not prepare records of this court and I don't prepare records in the other court; he works in that court and I work in this court; our jobs are similar.

(Witness excused.)

M. L. Miller, the next witness called by The State of Texas, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Bergman:

My name is M. L. Miller; at this time I practice law in Dallas; I was connected with the District Attorney's office from January 1st, 1941, until January 1st, 1947, with the exception that in the summer of 1946 I resigned to make a race for County Commissioner; I was out for 3-months.

In 1942 I was assigned to the Grand Jury as Investigator and so served; later on I worked with the Grand Jury in a

dual capacity, handling Grand Jury as Assistant and working with them as an Investigator. During the time from October, 1942, until January 1, 1947, with the exception of those 3-months, I was connected with the Grand Juries of Dallas County in some capacity.

I know John King, Grand Prairie, Texas; he is a negro and he served on the October, 1942 grand jury. I know Charles D. Johnson of Carrollton, Texas; he is a negro and he served as a member of the Grand Jury while I was over there.

I know A. J. Sheppard of Mesquite, Texas; he is of the [fol. 29] negro race and he served on Dallas County Grand Jury for whatever term the record there shows. I know T. W. Pratt; he is of the negro race; he served on a Grand Jury during my tenure of office for whatever date the record shows. I know C. A. Walton, Dallas; he is of the negro race and he served on Grand Jury for whatever term the records indicate; I know Bonnie Johnson, Dallas, Texas; he is of the negro race and he served on Grand Jury during my tenure, whatever term the records indicate. I know William McShann; he is of the negro race and he served on Grand Jury of Dallas County for whatever term the records indicate. I also know Vernie Flowers, Dallas, Texas; he is of the negro race and he served on Grand Jury for whatever term the records indicate. I know LaFayette M. Turley; he is of the negro race and he served on a Grand Jury for whatever term the records indicate. I know Milton Grace, of Dallas, Texas; he is of the negro race and he served on a Dallas County Grand Jury for whatever term the records indicate. I know W. Barton Beatty, Junior, of Dallas, Texas; he is of the negro race and he served on a Dallas County Grand jury for whatever term the records indicate. I know Clarence F. Starks; he is of the negro race and he served on a Dallas County Grand Jury for whatever term the records indicate. I know Wheeler Hardaway, Dallas; he is of the negro race and he served on a Dallas County Grand Jury for whatever term the records indicate.

I do not recall Joe Dedies. I understand that he was on the Grand Jury for the last term of Mr. Gauldin's term but I did not serve with the Grand Jury for that term. I do know of my own knowledge that he did serve during the October Term, 1946, but I wouldn't know him to be a negro.

I do not know Travis Clark; I don't know whether he served as a Grand Juror in 1947; I am not familiar with what happened in 1947.

Cross-examination.

By Mr. Pinkston:

In the first 4 years with Mr. Gauldin, I served in the capacity of an Investigator, assigned to the Grand Jury; my duty was to be in the Grand Jury and in the District Courts; I was in the Grand Jury practically every minute unless I was in some major case here in one of the District Courts; that is between 1942 and 1947, with the exception of the 3-months I was out.

[fol. 30] As I recall, John King was the first negro placed on a Grand Jury after the Allen Hill case, and I believe that the records will show that to be October Term, 1942. I don't recall knowing another John King offhand.

I was in and out of Grand Jury some days 3 or 4-times during the morning. During whole term I would say that I would miss very few days being with Grand Jury some part of the morning; I was in there to testify only when it was necessary in some case.

I have known this John King for quite some time, I knew him before that; he lives out North of Grand Prairie at Bear Creek.

Outside of that Charles D. Johnson you mention I only know a youngster by that name. I can visualize that Charles Johnson in my mind, the one from Carrollton; I have lived near Carrollton but I did not know him out there or previous to his time on the Grand Jury. I remember that man Johnson from Carrollton; I am positive in my mind that he is a negro.

I know quite a few Sheppards, white and black; I can be positive that W. J. Sheppard is a negro; I saw T. W. Pratt in the Grand Jury room many times and I am positive that he is a negro. I know C. A. Walton; I possibly had seen him before 1943 but I did not know him, personally; I am positive that he served on Dallas County Grand Jury in 1944.

I met Bonnie Johnson after he came on the Grand Jury; I am positive that he is a negro. I knew William M. McShann as McShane; I met him after he came on the Grand

Jury; he is from Alpha, Texas. I am positive that he is a negro.

I knew Vernie Flowers on San Jacinto Street but I did not know him personally until he came on Grand Jury; I do know that he is a negro. I met LaFayette M. Turley; I was accused of knowing him previous to the time that he got on Grand Jury but I didn't know him; I didn't recognize him; I was supposed to have known him a long time ago. I am sure that he was a negro.

I did not know Milton Grace previous to the time that he served on the Grand Jury; I know that he is a negro; I know W. Barton Beatty Jr., and I saw him on Grand Jury; I did not know him before that; I am sure that he is a negro.

[fol. 31] I do not recall having known Clarence F. Starks before 1945 when he served on Grand Jury; he is a negro.

(Witness excused.)

The state closes.

Rebuttal.

David Murphy, the first witness called by The Defendant on Rebuttal, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Pinkston:

My name is Dave Murphy; I am assigned as Clerk of the Criminal District Court, Dallas County, Texas, by District Clerk, Dallas County, Texas. The books of that court are in my custody; I make the records and I have charge of them at all times. My books are kept in a combination locked vault; Billy Burden and I both have that combination. I make the entries and I have charge of the records of Criminal District Court, Dallas County, Texas.

Cross-examination.

By Mr. Collie:

Billy Burden and myself have concurrent jurisdiction over each other's office in these 2-courts. He comes over and assists me with my records and I do the same for him;

we work directly across from each other and we work concurrently; he and I work and have custody of the records in each court; we do not have keys to the other's office but we have both combinations. I have access to his office any time that I want to get in.

Re-direct examination.

By Mr. Pinkston:

I am assigned to a particular court and that is Criminal District Court, Dallas County, Texas. Billy Burden is [fol. 32] assigned to Criminal District Court No. 2, Dallas County, Texas.

Re-cross-examination.

By Mr. Bergman:

I was in court when Billy Burden testified about these records a few minutes ago, the records being with reference to empaneling Grand Juries since 1942 in Criminal District Court, the Minutes. Those books that Mr. Burden removed from Criminal District Court and brought over here are the Official Minutes, Criminal District Court, Dallas County. I prepared those books for Mr. Burden a few minutes ago when he testified from them; those are true records of my court and they are kept under my supervision and control over there.

Re-direct examination.

By Mr. Pinkston:

The District Clerk, Dallas County, Texas, is responsible for any of these books being lost. He is also responsible for all of the Clerks like me that work for him.

My duties are to keep the records of Criminal District Court, Dallas County, Texas.

(Witness excused.)

The defendant rests.

The state rests.

The defendant closes.

The state closes.

Testimony closed.

[fol. 33] REPORTER'S CERTIFICATE

I, Jack K. Tingle, Official Court Reporter in and for Criminal District Court, No. 2, Dallas County, Texas, do hereby certify that the foregoing 25-pages, numbered 1 to 25, inclusive, contain a full, true and accurate Statement of Facts, in narrative form, covering all of the facts adduced upon the Hearing of the Defendant's Motion to Quash the Indictment in the above entitled and numbered cause.

Witness my hand this 23rd day of March, A. D. 1948.

(Sgd.) Jack H. Tingle, Official Court Reporter, Criminal District Court, No. 2, Dallas County, Texas.

AGREEMENT OF COUNSEL

We, the attorneys-of-record for the State of Texas and the defendant, respectively, hereby agree that the above and foregoing 25-pages contain and constitute a full, true and correct Statement of Facts in said cause.

Witness our hands, this the 3rd day of June, 1948.

Will R. Wilson, Jr., Criminal District Attorney, Dallas County, Texas. (Sgd.) Douglas E. Bergman, (Sgd.) Waller M. Collie, Jr., Asst. District Attorneys. (Sgd.) W. E. Pinkston, Attorney for Defendant.

ORDER APPROVING STATEMENT OF FACTS

The above and foregoing Statement of Facts, certified to by the Official Court Reporter and agreed to by the attorneys-of-record for the State of Texas and the Defendant, having been presented to me, same is examined, approved and ordered filed as the Statement of Facts in this cause.

This, the 3rd day of June, A. D. 1948.

(Sgd.) Henry King, Judge, Criminal District Court, No. 2, Dallas County, Texas.

[fol. 34] IN COURT OF CRIMINAL APPEALS OF TEXAS

No. 24158

CASSELL

v.

STATE

OPINION—December 8, 1948

KRUEGER, Judge.

The offense is murder. The punishment assessed is death. • • •

The evidence adduced by the state, briefly stated, shows that appellant and Eddie Hamilton killed Lester Linwood Wilson with a piece of iron pipe while burglarizing the "Sportsmen's Center," a store owned and operated by one James M. Brooks.

• • • Appellant filed a motion to quash the indictment. • • •

His next complaint in his motion to quash the indictment is based on the ground of race discrimination practiced by the jury commissioners who selected the grand jury which returned the indictment herein against him. He charged that he was a Negro; that the deceased was a white man; that no Negro was selected by the jury commissioners as a grand juror; that there were from five to ten thousand adult male Negroes, resident citizens of Dallas County, Texas, who were qualified for grand jury service, being about one-seventh of the jury population of Dallas County, Texas; that the jury commissioner who selected the grand jury were white men; that they selected no Negro to serve on the grand jury; that in doing so they discriminated against the Negro race, and thus denied him the equal protection of the law guaranteed him under the 14th Amendment to the Constitution of the United States.

The trial court heard evidence relative to the allegations of race discrimination. Appellant called as witnesses the three jury commissioners to support the allegations in his motion. Each one of the jury commissioners testified in substance that they did not discriminate against the Negro race in the selection of grand jurors; that they sought to select fair and impartial men who were qualified for grand

jury service; that they were instructed by Judge King not to discriminate in any way against any race or creed; that he did not tell them that they had a put a Negro on the grand jury; that it was up to them; that it applied to Mexicans and Italians as well. One of the members of the jury commission contacted the principal of the Negro high school, who is a Negro, but he said that he could not serve—that his time belonged to the city schools; that he knew Negro doctors, school teachers, and lawyers, but no one could hardly expect them to neglect their professional duties to their patients and clients to serve for a period of three months on a grand jury. He further testified that before they selected any grand jurors, they contacted men who they knew were qualified to ascertain if they could and would serve. Although there was no Negro selected by them for grand jury service, there was no intentional discrimination by them against the Negro race.

Appellant next called A. C. Partee, who testified that he lived in Dallas County; that he is Executive Secretary of the Progressive Voters' League; that in that capacity he maintained a list of qualified Negro voters in Dallas County; that he would estimate that the adult male voting strength of the Negro race in Dallas County is about five thousand five hundred; that figure includes both poll taxpayers and poll tax exemptions; that if a Negro had been selected as a grand juror for the October Term, he would have known about it; that he knew the names of some Negroes who have served on grand juries, to-wit: Travis Clark, S. W. Hudson, Jr., W. Barton Beatty, Jr., T. W. Pratt, C. F. Stark, and L. M. Turley. The record further discloses that since the year 1943, Negroes were selected as and served as grand jurors at each and every term of court up to October, 1947, when this indictment was returned. It occurs to us that an issue of fact was raised by the evidence which the court, in the exercise of his discretion, determined adversely to appellant, and the court's determination of the issue is binding on this court as much so as if the issue had been decided by a jury. We think that the court was justified in overruling the motion to quash the indictment unless it can be said that a failure to select one [fol. 35] one or more Negroes for grand jury service at each and every term of court when a grand jury is impaneled is in and of itself conclusive evidence of race discrimi-

nation, notwithstanding the fact that Negroes were selected for grand jury service at every preceding term of court for a number of consecutive years. We have not found any case in which a court has held that it is imperative that one or more Negroes be selected on each and every grand jury in order to comply with the equal protection of the law. * * *

IN COURT OF CRIMINAL APPEALS OF TEXAS

OPINION ON APPELLANT'S MOTION FOR REHEARING—January 19, 1949

DAVIDSON, Judge:

Appellant insists that we erred in reaching the conclusion that the record did not reflect discrimination against members of the Negro race in the selection and impaneling of the grand jury which returned the indictment in this case. He insists that he is supported in his contention by the decisions of the Supreme Court of the United States and especially those of Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, and Hill v. Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559.

We are familiar with the holding in those cases, as the decision of this court was reversed in each case. We are perfectly willing to follow the holding in those cases and will not hesitate to do so when thought controlling. But we cannot bring ourselves to that conclusion in this case.

It is our opinion that the case of Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692, by the Supreme Court of the United States, sustains the conclusion reached in our original opinion.

In the cases involving the question of race discrimination in the organization of grand juries, we must not lose sight of the fact that the sole and only question involved is a determination as to whether race discrimination was practiced. It is not a question as to whether a member of the Negro race should or should not have been drawn and impaneled on the grand jury. Nor is it a question as to the inequality in the numbers who serve or a comparison, upon a percentage basis of population, between the white and Negro citizens who are eligible for grand jury service. No person has the right to say that a member of his race shall

be impaneled on the grand jury. Nor does proof, merely, that a member of the Negro race is not impaneled upon the grand jury establish that discrimination has been practiced against members of that race, in the organization of the grand jury.

Such is our understanding of the holding in the Akins case, supra, not only in the majority but also in the dissenting opinion.

Dallas County, where this prosecution was maintained, has two district courts having jurisdiction in criminal cases. Each of these courts impanels two grand juries each year. Grand juries are impaneled in January, April, July and October of each year.

The instant record deals with grand juries impaneled beginning with the October term, 1942, and through the October term, 1947, at which term the instant indictment was returned. This period of time accounts for twenty-one consecutive grand juries in Dallas County. A member of the Negro race was upon each of those grand juries, save and except October, 1943, April and October of 1946, and April and October, 1947.

The record does not reflect the number of Negroes summoned for grand jury service and not impaneled on the grand jury during that period of time; nor is it shown that on those grand juries upon which no member of the Negro race actually served, no Negro was summoned for grand jury service at those terms and excused by the court.

Under the statute law of this State, sixteen men are summoned for grand jury service, from which the grand jury of twelve are selected. Art. 338, C. C. P.

Proof, merely, that a member of the Negro race did not serve on the grand jury by no means establishes that no member of that race was not selected by the jury commissioners to do grand jury service.

[fol. 36] Under the facts mentioned, we cannot bring ourselves to the conclusion that this case comes within the rule announced by the Supreme Court of the United States that the systematic exclusion of Negroes from grand jury service evidences race discrimination. Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074.

The record before us reflects that there were 5,500 Negroes in Dallas County qualified to vote. But the qualification to vote is but one of the qualifications for grand jurors. Art.

339, C. C. P. It could hardly be said, then, that this record reflects there were 5,500 Negroes in Dallas County qualified for grand jury service.

Viewing this record as a whole, we can arrive at but one conclusion and that is that since the decision of the Supreme Court of the United States in the Hill case, supra, the officers of Dallas County have earnestly endeavored to comply therewith and to do no act whereby it could be said that members of the Negro race had been discriminated against in the organization of the grand juries. Indeed, the district judges had endeavored to impress upon the jury commissioners that fact, and had done about everything a judge could do to effect that end, save and except to instruct the jury commissioners to select members of the Negro race for grand jury service, which instruction, if given, would be contrary to law.

The jury commissioners, who drew the list of grand jurors from which the grand jury that returned the indictment against appellant, appear to have contacted members of the Negro race who they thought possessed the qualifications of grand jurors, with a view of having them serve on the grand jury, and refrained from placing them on the grand jury, at their request. While it is true the jury commissioners were not clothed with the authority to pass upon excuses of those eligible for grand jury service, yet it appears to us that this conduct on the part of the jury commissioners fortifies and supports them in their position that they did not discriminate against members of the Negro race in drawing the grand jury that returned the instant indictment.

Believing that appellant has failed to show race discrimination in the organization of the grand jury, as alleged, his motion for rehearing is overruled.

* * * * *

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—April 4, 1949

On Consideration of the motion for leave to proceed herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 4, 1949

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted, and the case is placed on the summary docket. The case is transferred to the appellate docket as No. 692.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 39] THE SUPREME COURT OF THE UNITED STATES

STIPULATION COVERING CONTENTS OF RECORD—Filed September 2, 1949

Now Come Lee Cassell, petitioner in the above styled matter, and likewise comes the State of Texas, by and through their undersigned attorneys, and hereby stipulate that the Transcript of Record in this cause shall contain the hereinafter described documents and proceedings, which are attached hereto and accurately reflect said documents and proceedings, the date of filing thereof and the date of the occurrence thereof, which transcript of record as so constituted accurately reflects all proceedings in the Criminal District Court No. 2 of Dallas County, Texas, and in the Court of Criminal Appeals of the State of Texas pertaining to the issues presented by the Petition for Certiorari:

Pages

1. The opinion of the Court of Criminal Appeals on both original submission and motion for rehearing . .
2. The indictment filed November 18, 1947 . . . . . .
3. The petitioner's motion to quash the indictment
4. The controverting affidavit to the motion to quash the indictment filed by the State of Texas . . .
5. The statement of facts containing all the testimony adduced in connection with the motion to quash and the controverting affidavit thereto, after the submission of which testimony and the argument of counsel thereon the Judge of the Criminal District Court No. 2 of Dallas County, Texas overruled the motion to quash and defendant excepted . . . . . .

This stipulation is signed by the parties and filed in the Supreme Court of the United States, together with the attached copies as indicated, to constitute the entire Transcript of Record in said cause, but without prejudice to the rights of the parties by supplemental stipulation or motion under the rules of the Court to bring forward such additional parts of the record as may hereafter appear to either of them to become material to the proceedings in The Supreme Court.

Done at Houston, Texas, this — day of August, 1949.

Lee Cassell, Petitioner, by Chris Dixie, Attorney of Record; State of Texas, by Price Daniel, Attorney General of Texas, by Joe R. Greenbelt, First Assistant Attorney General of Texas, Attorneys of Record.

[fol. 40] [File endorsement omitted.]

Endorsed on Cover: In forma pauperis. Enter Petitioner pro se. File No. 53,694. Texas, Court of Criminal Appeals. Term No. 46. Leo Cassell, Petitioner, vs. The State of Texas. Petition for writ of certiorari and exhibit thereto. Filed February 18, 1949. Term No. 46 O. T. 1949.

SUPREME COURT, U.S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 46 46

LEE CASSELL,
Petitioner,

vs.

STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER, LEE CASSELL

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 46

LEE CASSELL,

Petitioner,

vs.

STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

Opinion in the Court Below

The opinion of the Court of Criminal Appeals of Texas is officially reported in ————. Also see 216 S. W. (2d) 813.

It appears at pages 29-33 of the Transcript of Record filed herein.

No opinion was rendered by the Trial Court.

Jurisdiction

The decision of the Court of Criminal Appeals affirming the judgment of the Criminal District Court No. 2 of Dallas

County, Texas, was rendered December 8, 1948. Rehearing was denied, with extended opinion on January 19, 1949. Certiorari to review the judgment of the Court of Criminal Appeals was granted by this Court on April 4, 1949, upon a petition therefor filed on February 18, 1949. Jurisdiction rests upon Section 1257(3) and Section 2106 of Revised Title 28, United States Code; see also Section 237(b) of the Judicial Code as amended, and 28 U. S. C. Section 344(b).

The jurisdiction and duty of this Court to make an independent appraisal of the facts where claim is made that a Federal right has been denied has often been restated, *e. g. Norris* v. *Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074, 1077. The Texas Court of Criminal Appeals is the Court of last resort in criminal proceedings in that State.

Statement of the Case

1. The Record

On November 18, 1947, Petitioner, a negro citizen, was indicted for murder by a grand jury of Dallas County, Texas. The Grand Jury of twelve was wholly composed of white men. A motion to quash the indictment for racial discrimination was seasonably filed by Petitioner's counsel (Tr. 1-3) and in response thereto the State filed its controverting affidavit, denying discrimination and affirmatively pleading its policy (Tr. 4-5):

> "In support of this controverting affidavit, the State would further show that *Practically all* of the Grand Juries which have served in Dallas County, Texas, since the rendering of the opinion in Hill v. The State of Texas by the Supreme Court of the United States have had *at least one negro* Grand Juror, respectively, on them. * * *." (Italics supplied.)

Upon the issues tendered by the pleadings, an extended record was made, covering every Grand Jury since *Hill* v. *Texas*, decided June 1, 1942, which record was fully reviewed by the courts below.

From the record, it is perfectly clear that the allegation "at least one negro" means *never more than one* as a matter of State policy. And the allegation "practically all Grand Juries" means sixteen of the twenty-one Grand Juries appointed since 1942.

Thus, in five and one-half years, sixteen negroes have served one at a time out of a total of two hundred fifty-two Grand Jurors and an additional eighty-four "spares" (likewise all white).

This Court made a brief survey of Texas Grand Jury procedures in the *Hill* case, 316 U. S. 400, 86 L. Ed. 1559. In short, the two Criminal District Courts of Dallas County, Texas, alternately appoint three Grand Jury Commissioners at each term of Court. This makes four Grand Juries a year (Tr. 32). The three Commissioners, after being duly sworn and charged, select a Grand Jury Panel of sixteen, of which twelve are appointed regular Grand Jurors, and four are spares. Texas Code of Criminal Procedure, Art. 338 (Tr. 32).

After the three commissioners are appointed, Texas Statutes provide that they shall retire possessed of "the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county." Texas Code of Criminal Procedure, Art. 336.

They are to select Grand Jurors who are citizens and qualified voters, of sound mind and good moral character, able to read and write, not convicted of a felony, and not under indictment or accusation for felony or theft. Texas

Code of Criminal Procedure, Art. 339. (See *Akins* v. *Texas*, footnote 3.)

In the present case, the following evidence was adduced concerning the instant Grand Jury:

Mr. S. Tinsley Chandler, Commissioner, testified that he submitted 6 names, none of which were negroes (Tr. 6). He was not personally acquainted with any negro citizen of Dallas County that he thought was qualified to sit on a Grand Jury, or that he would recommend (Tr. 7). He denied an intention to discriminate for racial reasons (Tr. 7).

Mr. A. C. Moser, Jr., Commissioner, testified that he recommended five or six men, all white (Tr. 8). This Commissioner telephoned one negro, the Principal of the Lincoln High School, a Mr. Melvin, and asked if he would serve. This negro prospect replied that he would be glad to, but the Commissioner must get approval from his superior, Mr. W. T. White, Superintendent of the Dallas School System. He could not get Mr. White on the phone, but Mr. White's secretary vetoed the project by telephone (Tr. 8, 9), saying Mr. Melvin would be too busy.

This Commissioner knew numerous other qualified negroes, but made no further inquiry about negroes (Tr. 9). He denied an intent to discriminate.

The last commissioner, Mr. B. F. McLain, recommended five or six men, all white (Tr. 10). He did not recommend any negroes. He discussed and would have accepted the negro principal if he could be procured, or any other qualified negro, if his name had been submitted (Tr. 11). He denied an intent to discriminate.

Mr. A. C. Partee, Executive Secretary of the Progressive Voters League, produced a list of about 5,500 adult negro male voters of Dallas County (holders of poll taxes) (Tr. 12). (This would supply the pool of available Negro Grand

Jurors.) The records produced by this witness were compiled from the Poll Tax list issued by the County Tax Assessor and Collector. This list is marked with "C" or "Brown" or "Colored" or "Negro" to indicate all negro voters (Tr. 12). Mr. Ben F. Gentle, Tax Collector and Assessor, confirmed that the poll tax list is marked to indicate the white or negro race of the voters of Dallas County (Tr. 15).

Mr. Millard Sweatt, Special Investigator of the District Attorney's Office, called by the State, testified that he had investigated the Grand Jury Records of Dallas County, Texas, for the purpose of testifying, thus:

First: From the October 1942 until the November 1947 term (the instant Grand Jury), the official Grand Jury Records of the Court bear the word "colored" behind the name of each Negro Grand Juror who has served (Tr. 15).

Second: With the original records in hand, he gave a complete run down of every Grand Jury for the five and one-quarter years in question, naming in each case the negro member of a Grand Jury, if one served (Tr. 18, 19). The Court of Criminal Appeals summarized the record so made, and Petitioner accepts it as accurate:

> "The instant record deals with grand juries impaneled beginning with the October term 1942, and through the October term 1947, at which term the instant indictment was returned. This period of time accounts for twenty-one consecutive grand juries in Dallas County. A member of the negro race was upon each of those grand juries, save and except October, 1943, April and October, 1946, and April and October, 1947" (Tr. 32).

The Supreme Court is invited to inspect the testimony of Judge Henry King, Judge of the Trial Court (Tr. 16-18). He makes two points by his testimony: *First*, since *Hill*

v. *Texas,* he has instructed his Commissioners about that decision, and about the constitutional prohibition against discrimination; *Second,* he reviewed the record to show that "a negro" has most always served. Emphasis is placed on the fact that only a few times have the grand juries failed to include "a negro".

The juxtaposition of the two points in his thinking, plus the conspicuous absence of further variation of the practice, demonstrates, petitioner submits, that he and the other officials of the State believe, in entire good faith, that a system of one, and one only, of the negro race, most of the time or at least on every grand jury, is a sufficient compliance with the constitutional mandate for due process and equal protection.

Otherwise stated, if the absence of that one negro is infrequent, it is of no significance. The State should be credited substantially with a policy of having one every time. With this, any question of discrimination ends.

2. *The Negro Population of Dallas County*

That Dallas County, Texas, has a large and well developed negro population has long been judicially known. In *Hill* v. *Texas,* 316 U. S. 450, 86 L. Ed. 1559 (1942) reversing 157 S. W. (2d) 369, Mr. Chief Justice Stone recited from the census records:

> "Another witness estimated the total negro population of the county as 55,000. Actually, this was an under-estimate, for the 1940 census shows the total population of the county to be 398,564, of whom 61,605 are negroes, and of these, 19,133 are males twenty-one years old or more. The census of 1930 showed only 7.5 per cent of the negro population of the county to be illiterate. The census data of 1940 show that of the 17,263 male negroes in the county who were twenty-five years of age or more, 16,107 had attended grade school or higher institutions of learning. Of these 7,979 had attended grade school from five to eight years; 1,970

had attended high school from one to three years, and 1,124 for four years; 466 had attended college from one to three years, and 284 for four years or more."

And, in *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945) Justice Reed noted for the majority:

"About fifteen and one-half per cent of the population of Dallas County, Texas, is negro. A substantial percentage of them are qualified to serve as grand jurors. No exact comparison can be made between the white and negro citizens as to the percentage of each race which is eligible. On the strictly mathematical basis of population, a grand jury of twelve would have 1.8552 negro members on the average."

(On the present record, the strictly mathematical breakdown is: Percentage of Negro participation over 21 grand juries . . . 6.36% Per Grand Jury average negro participation. . . . .762 persons. In either case, actual representation is about 40% of the population ratio.)

The judicial knowledge of the court is amply corroborated by the present record showing a specific pool of 5,500 adult negro poll tax payers in Dallas County. Likewise at least one of the jury commissioners knew a large number of qualified negroes.

3. Some Miscellaneous Facts

As to the fruits of the "white man's court", brief reference is made to the Bureau of Census, April, 1946 report, tabulating 1945 executions by race in the United States that year:

Total executions 1945 117

	White	Negro	
For murder	37	52	
Rape	4	22	
Robbery	0	1	
	41	75	116 (one other)

Three years of FBI statistics show arrests for murder and rape by race to be as follows:

	Total Arrests		Arrests for Murder		Arrests for Rape	
	White	Negro	White	Negro	White	Negro
1945	390,315	145,571	2897	2441	4638	1943
1946	478,211	159,172	3559	2871	5887	2313
1947	536,695	187,781	3555	2995	6731	2917

(Source: Uniform Crime Reports issued by Federal Bureau of Investigation, Dept. of Justice, Vol. XVI, No. 2; Vol. XVIII, No. 2; Vol. XVIII, No. 2.)

While arrests "on suspicion" may be safely assumed to be more frequent for negroes, even as so weighted, the chances of an arrested negro charged with murder to end up in the chair are about two to three times larger than that of a white man. For rape, the negro's chances are about ten times greater.

A tragic by-product of negro exclusion or limitation from our courts, is the disinterest of the judicial machinery in intraracial crimes. An excellent discussion of this matter appears in the September, 1941, Annals of the American Academy of Political and Social Science by Dr. Guy B. Johnson.

As an illustration, a ten year study of murder in Richmond, Virginia, shows only 5.6% of negro defendants received the life sentence for the murder of negroes, but 100% received life for the murder of whites.

In North Carolina, only 5.9% of negroes received the maximum for killing negroes over a similar period.

"Just another negro killing" is a familiar expression in the South. Only an insensitive court can fail to realize the impositions thus visited upon the law abiding elements of the Negro populations, who are depending on discriminatory jury systems to protect them from lawlessness in their midst.

4. *Limitations*

Article 180, Texas Code of Criminal Procedure expressly provides that the offense of murder shall not be barred by limitation.

In 1941, following *Smith* v. *Texas*, the Texas Legislature enacted Article 183 of the Code of Criminal Procedure which tolls limitation on any offense "during the pendency" of any indictment later determined to be invalid for any reason.

Therefore, if Petitioner's conviction be reversed he is still subject to re-indictment and retrial for murder or any other alleged offense that the State might elect to carve from the transaction. See *Hill* v. *State*, 171 S. W. (2d) 880 (1943).

Errors Below Relied On Here

Petitioner relies on these points of error:

1. This record shows that the three Grand Jury Commissioners (all white) excluded and discriminated against Negroes in the selection of the instant Grand Jury because they either did not know or they did not seek to learn of available qualified Negroes for Grand Jury service, considering themselves discharged of their constitutional duty by a single, half-hearted effort to obtain one, and only one, Negro juror. The indictment should therefore have been quashed for a denial of equal protection and due process.

2. A state policy which limits the Negro race to a maximum of one member per Grand Jury in Dallas County, Texas, must be inferred where, since June 1, 1942 (the date of *Hill* v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559), 16 Grand Juries have contained one Negro, and 5 have contained none —especially where the practice is submitted by the State Courts and administrative officials as a lawful compliance with the constitutional mandate expounded in *Hill* v. *Texas*,

supra, and *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945). The indictment derived from such a policy of limitation should have been quashed for denial of equal protection and due process.

3. A single, half-hearted effort to obtain only one Negro for the instant, all-white Grand Jury, does not relieve the inference of unconstitutional discrimination where the record shows that, in any event, established state policy and practice limits the Negro race to a maximum of one member; and on every Grand Jury the sole variation is between one Negro or none. The indictment should have been quashed for a denial of equal protection and due process.

4. Deliberate limitation to one Negro per Grand Jury is unconstitutional discrimination in this case, whether viewed as a token compliance to provide a veneer of legality, or as an ingenuous apportionment to the Negro race of one place, and no more, on the respective Grand Juries of Dallas County, Texas. The indictment should therefore have been quashed.

Argument under First Three Points

1. *This record shows that the three Grand Jury Commissioners (all white) excluded and discriminated against Negroes in the selection of the instant Grand Jury because they either did not know or they did not seek to learn of available qualified Negroes for Grand Jury service, considering themselves discharged of their constitutional duty by a single, half-hearted effort to obtain one, and only one, Negro juror. The indictment should therefore have been quashed for a denial of equal protection and due process.*

2. *A state policy which limits the Negro race to a maximum of one member per Grand Jury in Dallas County, Texas, must be inferred where, since June 1, 1942 (the date of* Hill *v.* Texas, *316 U. S. 400, 86 L. Ed. 1559), 16 Grand*

Juries have contained one Negro, and 5 have contained none —especially where the practice is submitted by the State Courts and administrative officials as a lawful compliance with the constitutional mandate expounded in Hill *v.* Texas, *supra, and* Akins *v.* Texas, *325 U. S. 398, 89 L. Ed. 1692 (1945). The indictment derived from such a policy of limitation should have been quashed for denial of equal protection and due process.*

3. *A single, half-hearted effort to obtain only one Negro for the instant, all-white Grand Jury, does not relieve the inference of unconstitutional discrimination where the record shows that, in any event, established state policy and practice limits the Negro race to a maximum of one member; and on every Grand Jury the sole variation is between one Negro or none. The indictment should have been quashed for a denial of equal protection and due process.*

As to the instant Grand Jury, this record falls into a familiar pattern. Two commissioners apparently knew of no qualified available Negroes and definitely made no effort to learn of any. They were content with the "effort" of Mr. Moser to obtain the Negro school principal, notwithstanding the questionable and feeble way in which the whole project was pursued.

Insofar as lack of knowledge or acquaintance is responsible for the failure to consider Negroes for service, and the resulting total exclusion, the Supreme Court is reminded that the same reasons (or alibis if they be viewed thus) were found in *Hill* v. *State*, 157 S. W. (2d) 369 (1942) to justify total exclusion in Dallas County since the beginning of time.

Likewise, in *Smith* v. *State*, 136 S. W. (2d) 842 (1940), lack of acquaintance was found sufficient to avoid the conclusion that unconstitutional discrimination was practiced in Harris County, Texas.

Both cases were reversed, with the observation in *Smith* v. *Texas*, 311 U. S. 128, 83 L. Ed. 84:

> "Discrimination can arise from the action of Commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve."

The conclusion so announced is a vital instruction to state officials charged with the selection of such an important body in our criminal administration. And practically speaking, it is also most necessary as an enforcement means, as the State Court results in the *Smith* and *Hill* cases have shown.

As to the overall record the facts of this case need not be labored. In twenty-one Grand Juries over 5½ years some variation from the formula of "one and only one" would have occurred.

Not only is this invariable maximum significant by itself —but the trial court and the Court of Criminal Appeals viewed the record with satisfaction as a sufficient compliance with their directions from the United States Supreme Court.

The Court of Criminal Appeals makes the point that the record does not reflect that "no Negro was summoned for Grand Jury service at those (five) terms and excused by the court." Of course, in the face of an invariable pattern, it must be inferred that the State would have produced such evidence, if available. *Norris* v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074.

It must be remembered that until 1942, no Negro had ever served on a Grand Jury in Dallas County, Texas, *Hill* v. *Texas*, 316 U. S. 400, 86 L. Ed. 1550, a fact which did not show discrimination to the Texas Court of Criminal Appeals. *Hill* v. *State*, 157 S. W. (2d) 369.

Two Grand Juries, later the Supreme Court, reviewed the amended practice in *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692.

Now, if there be any doubt as to the way Dallas County has complied with constitutional directions, we remind the Supreme Court that in *Akins* v. *Texas* the court had before it the following testimony which was referred to by both the majority and minority opinions:

> By Commissioner Wells: "We had no intention of placing more than one Negro on the panel. When we did that, we had finished with the Negro."
>
> By Commissioner Tennant: "We three did not go to see any other Negroes, that is the only one. I did not have any intention of putting more than one on the list; * * *."
>
> By Commissioner Douglas: "Yes, sir, there were other Negro names mentioned besides the one we selected; we did not go talk to them; we liked this one and our intentions were to get just one Negro on the Grand Jury; that is right. No I did not have any intention of placing more than one Negro on the Grand Jury.

A minority of the Supreme Court believed that the foregoing was clear proof of intentional and deliberate limitation on the basis of color. But the majority of the court chose to credit other testimony in the record consisting principally of generalities by the Grand Jurors and the trial court by which they asserted their over-all good intentions.

It is now apparent, however, that *Akins* v. *State* has been construed to authorize the "one and one only" system because the attitudes of Commissioners Wells, Tennant and Douglas have not been varied in a single instance since 1942.

The policy was foreshadowed and has been constant. Only the most unrealistic thinking could produce a conclusion that there is any hope for a variation in the pattern unless and until the Supreme Court decides in so many

words that purposeful limitation and the frozen pattern are unlawful.

Argument under Point Four

Deliberate limitation to one Negro per Grand Jury is unconstitutional discrimination in this case, whether viewed as a token compliance to provide a veneer of legality, or as an ingenuous apportionment to the Negro race of one place, and no more, on the respective Grand Juries of Dallas County, Texas. The indictment should therefore have been quashed.

Discrimination, where it takes the form of exclusion of negroes from Grand Jury panels solely because of their race or color, constitutes a denial of the equal protection of the laws and due process as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664;
Virginia v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567;
Bush v. *Kentucky*, 107 U. S. 110, 27 L. Ed. 354;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839;
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074;
Rogers v. *Alabama*, 192 U. S. 226, 48 L. Ed. 417;
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500;
Hale v. *Kentucky*, 303 U. S. 613, 82 L. Ed. 1050;
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Smith v. *Texas*, 311 U. S. 128, 83 L. Ed. 84;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692.

The principle has been applied with equal force whether the discriminaiton has occurred by virtue of a statute (*Strauder* v. *West Virginia*, *supra*; *Bush* v. *Kentucky*, *supra*) or by the action of administrative officers (*Neal* v. *Delaware*, *supra*; *Carter* v. *Texas*, *supra*), and whether the

exclusion is from service on petit juries (*Strauder* v. *West Virginia, supra; Norris* v. *Alabama, supra*) or on Grand Juries (*Carter* v. *Texas, supra; Smith* v. *Texas, supra.*)

And implicit in the Supreme Court's decisions is the further rule that discrimination is not confined to total exclusion, but may exist where token representation is given to the negro race in order to provide a veneer of legality, or to perpetuate discrimination by establishing a bare minimum of participation, which will "get by" the Supreme Court.

In *Smith* v. *Texas, supra,* the sole question for decision presented by petitioner was:

> "Must a negro defendant, in a State Criminal Court, introduce evidence showing a *total exclusion of members* of his race from Grand Juries in order to establish a violation of the equal protection clause of the Fourteenth Amendment? In other words, may officers of a State Tribunal cover up their intended discrimination against the negro race by a thin veneer of compliance, and thereby avoid the prohibition of the Fourteenth Amendment?" (See petition for Writ of Certiorari, page 4; *Smith* v. *Texas, supra.*)

In finding unconstitutional discrimination in that case, the Supreme Court necessarily held that total exclusion is not the only way to accomplish discrimination, but that a gross disparity of negro participation was convincing proof of discrimination against the Constitution. "Chance and accident alone, could hardly have brought about the listing for Grand Jury services of *so few* negroes * * *."

And, in *Akins* v. *Texas, supra,* the majority opinion held:

> "A purpose to discriminate must be present, which may be proved by systematic exclusion of eligible jurymen of the above described race, or *by unequal application of the law to such an extent as to show intentional discrimination* * * *." (Italics supplied.)

And, the minority opinion by Mr. Justice Murphy, announced:

> "• • • Racial limitation, no less than racial exclusion, in the formation of juries is an evil condemned by the equal protection clause. 'The Amendment nullifies sophisticated, as well as simple minded, modes of discrimination.' • • •" .

It is interesting to note that at least three State Supreme Courts have correctly understood in various degrees the necessary implication of Supreme Court pronouncements in these discrimination cases.

The Supreme Court of Missouri in *State* vs. *Ramsey*, 197 S. W. (2d) 949, said, *inter alia:*

> "The record in this case fails to show any deliberate and intentional limitation, or discrimination, because of race or color. • • •"
>
> "There is nothing to show bad faith, or design, to exclude negroes, or to select them on any proportional, or limited, basis • • •."

And the Supreme Court of Maryland, in *Zimmerman* v. *State*, 59 Atl. (2d) 675, affirmed per curiam, 93 L. Ed. Adv. Ops. 425, stated:

> "Mr. Folger's testimony that one, and only one, negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this policy was not obtained by chance, but was dictated by policy. But, any inference based on a mere numerical pattern, is refuted by the undisputed evidence that two negroes served on each of two Grand Juries in 1945, and the Grand Jury for the May term, 1946, originally contained the names of two negroes who were excused from serving. The method which has produced a variable pattern since 1944, is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before

1944, it was obviously discontinued in 1945 and in 1946."

Likewise, the Supreme Court of Louisiana, in *State* v. *Perkins*, 31 So. (2d) 188, 211 La. 993, stated:

"• • • Suffice it to say, that the Supreme Court of the United States has declared, in substance, that equal protection of the law requires that a colored person shall be afforded an opportunity to have members of his race serve upon the Grand and Petit Juries, in cases involving his life or liberty, and, therefore, any denial of this guarantee, either by a law which does not provide a fair mode of selection, or by officers who *administer a valid law so as to accomplish gross inequality*, cannot be countenanced. • • •" (Italics supplied)

In addition to the Supreme Courts of Missouri, Maryland and Louisiana, it will be seen that even in Texas, as long ago as 1903, discrimination by limitation was condemned, but has since been allowed. The pertinent decisions are incorporated in an article by a scholar,[1] who wrote a rather prophetic article in 1939 which may be of interest to the Supreme Court. It is one of few instances in which the precise question has been taken in hand in our legal literature.

"• • • In an effort to comply with the Fourteenth Amendment, jury officials may select a definite number of negroes for the grand and petit juries, without regard to the total or the proportion of negroes qualified for jury service. The arbitrary limitation in the selection of negroes to a definite number which is less than a proportional representation would seem to be an illegal discrimination. Since negroes cannot demand proportional representation on the jury, or a mixed

[1] RACE DISCRIMINATION IN JURY SERVICE, 19 Boston University Law Review 413, by Bernard S. Jefferson, AB 1931, U.C.L.A.; LLB 1934, Harvard Law School; Member California Bar; Assistant Professor, Howard University School of Law.

jury in any degree, an arbitrary selection, for instance, of one negro grand juror, would appear to run counter to the spirit of the Fourteenth Amendment. Obedience to the Constitution would suggest a jury selected without regard to race or proportional representation with respect to the population, or qualified jurors, which would mean, perhaps, a jury composed at times of no negroes, and at other times, a jury with a greater or lesser number of negroes than the ratio which the number of qualified negroes bears to the whole. An arbitrary selection and limitation in the number of negroes placed on the panel ought to be evidence of race discrimination, in spite of a jury commissioner's testimony that the selection of jurors was made without discrimination against any race. The Amendment operates negatively, not guaranteeing to a defendant the right to a jury composed in whole or in part of members of his race. Any administration which operates affirmatively in form, arbitrarily does violence to the guaranty of the Amendment. There is very little authority on the point. In *Smith v. State* (45 Tex. Cr. 405, 77 S. W. 453 (1903)), the evidence indicated that about one-fourth of the jury population of the county were negroes. After two reversals of convictions because of discrimination in the selection of a grand jury, defendant was indicted a third time, by a grand jury selected from a list of names containing that of one negro. On investigation, it was shown that he was either dead, or had left the county a number of years before. The court reversed the third conviction, holding that illegal discrimination had been practiced in the selection of the grand jury. The court intimated that the mere selection of one negro for the grand jury would have been illegal under any circumstances, for it said:

> " 'While the commissioners, in their testimony, attribute this mistake to an accident, still it does not occur to us that it relieves the situation, even if they had drawn a negro juror who was a citizen of the county, and who was still alive. Of itself, it would

not show a lack of discrimination against the negro race. They testify that their purpose was to give the negroes representation on both the grand and petit juries, and that they decided to put one negro on each list. We do not understand that the law required that negroes shall be drawn or serve on juries, but the law does require that in the selection of grand and petit juries, the negro race be not discriminated against, where a negro is to be indicted or tried. It is no answer to this proposition to say that, in order to meet the decisions of the Supreme Court of the United States, they discussed the question, and decided to place one negro on the grand jury, in order that the negro race be represented. An effort to comply with the Fourteenth amendment and the decision thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson County, might have entitled the negro race to a greater representation on both the grand and petit juries than is here shown. And when we take in connection with this, the fact that the commissioners drew or selected a dead negro to serve on the grand jury, it makes it evident that they did not exercise that care in the selection of as important a body as the grand jury that would indicate their purpose was not to discriminate against the negroes.'

"But a few years later, the same court decided that the allowance of a definite number of negroes on the juries was not evidence of race discrimination:

" 'While it is urged by appellant that the attempted prorating of jury service, and the allowance of only so many negroes on the grand jury and petit jury, is evidence of discrimination as stated in the Thomas case, *supra*, we do not believe this is true; but, looking to the whole record, we think it is evident that the jury commissioners fairly and honestly discharged their duty, and did not, in fact, discriminate against the negro race in the selection of either the grand or

petit jury * * *.' Washington vs. State, 51 Tex. Cr. 542, 103 S. W. 879, 881 (1907) (Tex. Cr. App.)'' [2]

The extended remarks on the subject of purposeful limitation, whether in proportion to population ratios or not, have been made in this brief in view of the concluding sentence in *Akins vs. Texas, supra,* in which the majority implied that the question is still open, as to whether a purposeful limitation of jurors by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligible, is good or bad under the Fourteenth Amendment.

We earnestly entreat the Supreme Court to carefully measure the consequences of approving purposeful limitation in any proportion, because nothing could be more destructive to the evolution of a wholesome citizen's right of participation in Government, regardless of race or color.

It goes without saying, we believe, that the ugly results of racial prejudice are not to be judged in the same light as a scientific social effort by a State to improve the caliber of its juries, such as was involved in Fay vs. New York, 332 U. S. 261, 91 L. Ed. 2043.

Due notice must be taken, also, of Congressional Enactments designed further to implement the purposes of the Fourteenth Amendment—18 Statutes 336, 337, c. 114, U.S.C.A. Section 44, 2 FCA, title 8, section 44.

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[2] In *Akins* v. *Texas, supra,* the Supreme Court makes the statement that recent pronouncements of the Texas Court of Criminal Appeals have disapproved of the idea of limitation to a proportional representation, citing *Hamilton* v. *State,* 150 S. W. (2d) (1941) and *Hill* v. *State,* 157 S. W. (2d) 369 (1941). A careful reading of those opinions, however, will reveal that they mean a defendant may not *demand* proportional representation. At the same time the Texas court was permitting state officials to operate the judicial machinery without any negro participation whatever. We know of no Texas case which expressly disapproves of proportional representation imposed by the state on the defendants. The present record and opinion reveal a real, though silent, approval of state imposed limitation, without inquiry as to whether it is proportional or not.

It is significant that the criminal act forbidden by that Statute is to exclude, *or fail to summon*, any citizen on account of his race. The Statute enjoins more than affirmative acts of discrimination. It also enjoins discrimination accomplished by inaction.

Lastly, it may be in order to say that the Supreme Court must erect and maintain high standards in enforcing the mandate of the Fourteenth Amendment if it is to expect the country at large and especially the south to follow suit. A vast majority of citizens and judicial officers in the south will rally to the standards set by the Supreme Court where they are spelled out clearly and unmistakably and leave no room for confusion or for the doctrines of Ku Klux Klanism vigorously advocated by a small minority.[3]

Petitioner, without extended argument, respectfully invites the Court to reject the purposeful limitation practice revealed by this record, based upon the following simple propositions of logic, which are believed to be self-evident:

(1) The broadcast tolerance is conceded to the States to effect their own schemes of jury selection. Selective and discretionary schemes have been upheld. No single jury need be representative. No inference arises from the fact that single or several juries may not be. The presumptions are in favor of the good faith performance of duties by state officials. All possible credence is given to their word, and to the assessment of their word by State Courts. A defend-

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[3] At least one state supreme court finds itself unable to understand the *Akin* case as to whether or not deliberate proportional limitation is legal or not. *Zimmerman* v. *Maryland*, 59 At. (2d) 675. In any event apparently the "one and only one" system is widely believed to be legal in the south. At least by "Shepardizing" the modern U. S. Supreme Court case and searching the West Publishing Company key numbers, we cannot find a single instance referred to in the reports in which as many as two negroes have ever served on a southern Grand Jury, except *Zimmerman* v. *Maryland*, *supra*.

ant who challenges the constitutionality of a jury carries a heavy burden of proof.

(2) The correlative, however, is not that States, thus unhampered, are more free to discriminate. To the contrary they are the better able to meet and eliminate in their own way the kind of discrimination that still lingers in the South against the substantial and progressing Negro race.

(3) A state which claims benefit of rules and presumptions in favor of a single or occasional all-white Grand Juries should by the same rules and presumptions be expected to produce occasional juries where one or several negroes are given the privilege to serve.

Variation downward to zero representation on one or several juries is permissible; but state policy must not set an absolute ceiling to the opposite swing of the pendulum—for thus the state claims for itself the operation of chance, but denies it to its citizens.

(4) Purposeful limitation is another means of exclusion. It is merely a degree of discrimination, and by no means a lesser evil. By its subtlety, it may well go undetected for longer and more harmful periods of time.

(5) Purposeful limitation is not relieved of its illegality because it is fixed to an approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles.

It is already well analyzed in the Akins case that a defendant may not *demand* proportional representation on any Grand Jury:

> "The number of our races and nationalities stands in the way of * * * such a concept."

Now, though a defendant may not demand it, may the State *impose* it on defendants or on the various races? The

same logical and practical considerations, we submit, should control both cases.

If the State is allowed to escape the Constitution by freezing one or even two Grand Jury seats for the negro, why cannot other of our well identified minorities come forward to claim the same reservations? Grand Juries selected with specific reference to any race are themselves discriminatory as to every race and minority which does not have equal reservation. And equal reservation (by limitation) is as impossible as it is offensive to a constitution devoted to the elimination of race as the controlling factor of citizenship rights.

It is inevitable that we must return to the idea that juries must be selected *without* reference to race. Limitation to proportionate representation may seem superficially permissible and an easy way out, but it leads precisely back to the unequal protection which the Supreme Court is charged to erase.

Prayer

Wherefore, petitioner prays that this cause be reversed and remanded to the State Courts for new proceedings in conformity with the Constitution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 46

LEE CASSELL, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

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IN THE

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OCTOBER TERM, 1949

No. 46

LEE CASSELL, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

PRELIMINARY STATEMENT

Petitioner Lee Cassell, a Negro, was indicted and tried for murder in the Criminal District Court for Dallas County, Texas. He was found guilty and the death penalty was recommended by the jury after the introduction of evidence which Petitioner admits is sufficient to sustain the verdict.[1] A motion to quash

[1]Petition For Writ of Certiorari and Brief in Support Thereof, p. 8. Because this appeal is in *forma pauperis*, and in the interest of brevity, the portion of the Trial Court's record and of the opinion of the Texas Court of Criminal Appeals dealing with the facts of the crime involved were omitted. Petitioner was found guilty of crushing the skull of a sleeping watchman with a piece of pipe in order to carry out a burglary. The facts are set out in the opinion, *Cassell v. State*, 216 S. W. 2d. 813 (1949, not yet officially reported).

the indictment, on the ground that he had been denied the equal protection of the laws in the selection of the grand jury in that no Negroes were selected to serve on the grand jury which indicted him, was presented by Petitioner (R. 1-3) and controverted by the State of Texas (R. 4-5). The motion to quash does not allege that Negroes had been intentionally and systematically excluded over any period of time. The complaint is only that no Negro was selected for *this particular grand jury.*[2] It is not controverted that the grand jury in question was selected and had been in general operation several weeks before this Petitioner was indicted. After presentation of evidence by both Petitioner and the State, Petitioner's motion to quash the indictment was overruled.

Appeal was taken to the Texas Court of Criminal Appeals, the Court of last resort in criminal matters. That Court affirmed the conviction and the action of the Trial Court in overruling the motion to quash the

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[2]This point in the motion to quash reads: "That defendant is a negro and is charged with the murder of Lester Linwood Wilson, a white man; that no negroes were placed on the Grand Jury which indicted him, and that there are and were from five thousand to ten thousand adult male negroes, resident citizens of Dallas County, Texas, who are and were qualified jurors, and who were qualified to sit as Grand Jurors, being about one-seventh of the jury population of Dallas County, Texas; that the jury commissioners appointed by the court were all white men; that in selecting the grand jury they drew no negroes on said grand jury, and in this connection they discriminated against them in the formation of said grand jury, and thus denied him the equal protection of the law, which is guaranteed him under the Fourteenth Amendment to the Constitution of the United States and the decisions thereunder." (R 3.) The motion to quash is addressed to the "equal protection" clause. Want of "due process" was not raised.

indictment.[2] After analyzing the evidence presented upon the hearing and the motion to quash in the Court below, it wrote:

> "Believing that appellant has failed to show race discrimination in the organization of the grand jury, as alleged, his motion for rehearing is overruled." (R. 31-33.)

After granting leave to Petitioner to proceed in *forma pauperis* (R. 33), this Court granted the petition for certiorari (R. 34). The single point raised by the petition for certiorari is that Petitioner's conviction is void because "of race discrimination in the selection of the grand jury which indicted him."[4]

STATEMENT OF THE CASE

The history of the selection of grand juries in Texas, and particularly in Dallas County, involves several decisions by this Court. The method of selection of grand jurors, as provided by the Constitution and statutes of Texas,[5] has recently been reviewed

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[2]R. 29-33; *Cassell v. State*, 216 S. W. 2d 813 (1949, not yet officially reported).

[4]Petition For a Writ of Certiorari and Brief In Support Thereof, p. 3.

[5]Section 13, Article V of the Constitution of Texas provides that a grand jury shall be composed of twelve men.

Section 19, Article XVI of the Constitution of Texas provides that the Legislature shall prescribe by law the qualifications of grand jurors.

Article 333 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that the District Judge shall appoint three jury commissioners.

Article 335 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that said grand jury commission-

by this Court and its validity has been accepted.* Petitioner does not now attack the validity of this method of selection.

This historical background is reflected from the record in this case. Henry King, Judge, Criminal District Court No. 2, Dallas County, Texas, who impanelled the grand jury which indicted Petitioner, testified:

> "I tried and I am familiar with the case of Hill v. The State, which went up from Dallas County around 1942, on the question of negroes not being on Grand Juries." (R. 16.)

The case of *Hill v. The State* referred to by the witness is *Hill v. State of Texas*, 316 U. S. 400

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ers shall appear before the Judge and take an oath that they will not knowingly select a grand juror whom they believe to be unfit or not qualified.

Article 336 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that at the time the jury commissioners are sworn in by the Judge he shall instruct them as to their duties.

Article 338 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that the jury commissioners shall select sixteen men from different portions of the county to be summoned as grand jurors for the next term of court.

Article 339 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that a grand juror must have certain qualifications.

Article 340 of the Texas Code of Criminal Procedure (Vernon, 1948) requires that the list of names selected to serve as grand jurors be sealed in an envelope.

Article 344 of the Texas Code of Criminal Procedure (Vernon, 1948) requires the District Clerk to open said envelope thirty days before court meets and make a copy of the grand jury and deliver it to the Sheriff.

These constitutional and statutory provisions are set out in Appendix at page 46.

Akins v. Texas, 325 U. S. 398 (1945).

(1942), in which this Court reversed a conviction by a Trial Court in Dallas County, Texas, on the ground of systematic exclusion of Negroes from the grand jury because of their race. Judge King testified in this case that:

> "Prior and subsequent to the handing down of the opinion the Hill Case, when I was charging Grand Juries I would tell them that there should not be any discrimination made on account of race, creed or color, or religion, and I particularly instructed them about the Hill Case. As a matter of fact, I explained the Hill Case to them and told them about it." (R. 17.)

> "I have always told them what the Constitution says with reference to discrimination against a person because of race, politics, religion or color. It is not my duty to tell them to put them on or not to put them on." (R. 18.)

The *Hill* case was decided by this Court on June 1, 1942. The Trial Court in Dallas County has four terms a year—January, April, July, and October. There was a Negro on the next grand jury to be impanelled after the *Hill* case was decided (R. 16-17).

The record shows that a Negro served on the grand jury for the October Term, 1942, and the January Term, 1943 (R. 18, 22, 24). During this latter term an indictment for murder was returned against L. C. Akins, a Negro, and he was convicted and sentenced to death. This judgment was affirmed by the Court of Criminal Appeals and certiorari was granted by this Court. The petition in that case was based upon a claim of discrimination against the Petitioner

because of his race in the selection of the grand jury which returned the indictment.[1] This Court sustained the conviction and affirmed the judgment. *Akins v. Texas*, 325 U. S. 398 (1945). In that case the Court stated:

> "The history and record of this case gives evidence that the courts of Texas which are charged with the trial of petitioner endeavored to comply with the federal constitutional requirements as to the selection of grand juries, according to the interpretation of this Court in Hill v. Texas, supra. Not only did the Court of Criminal Appeals reverse a former conviction of petitioner on its authority but the judge, now deceased, of the criminal district court of Dallas instructed the three jury commissioners, who selected this grand jury list, as testified to by each of them, that there should be no discrimination against anyone because of his color."

Subsequent to the January 1943 grand jury which was attacked and upheld in the *Akins* case, there was at least one Negro on the grand jury in Dallas County, Texas, for the April and July Terms, 1943; the January, April, July, and October Terms, 1944; the January, April, July, and October Terms, 1945; the January, July, and October Terms, 1946;[2]

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[1] Brief of Petitioner Under His Petition For a Writ of Certiorari, pp. 4-5, *Akins v. Texas*, *supra*.

[2] The Texas Court of Criminal Appeals is in error in its opinion in stating that no Negro served on the October 1946 Grand Jury. One James Dixon is identified as being colored and as having served by the Witness Sweatt (R. 19). Witness Burden also testified that Dixon served on the October 1946 Grand Jury. (R. 23.)

and the January and July Terms, 1947. (R. 14, 15, 18-19, 22-23, 24). Thus with three exceptions there has been at least one Negro upon each grand jury which has been impanelled in Dallas County, Texas, since the decision by this Court in the *Hill* case in 1942, prior to the grand jury which returned the indictment against the Petitioner. The record does not reflect how many Negroes were summoned for grand jury service and not impanelled on the grand jury nor those who were summoned and excused by the Court.

Turning then to the facts surrounding the selection of the particular grand jury which indicted the Petitioner. The Trial Judge gave instructions to the Grand Jury Commissioners who selected the October Term, 1947, grand jury that there should be no discrimination made on account of race, creed, color, or religion. He testified that, "I particularly instructed them about the *Hill* case. As a matter of fact I explained the *Hill* case and told them about it." (R. 17). Each Commissioner stated that the instructions of the Trial Judge to the effect that there was to be no discrimination because of race, color or creed had been followed.* With these instructions before

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*Commissioner Chandler: "When I was called down to serve as Grand Jury Commissioner, I was instructed by Judge King that there was no racial discrimination, not that a negro could or couldn't be selected for the Grand Jury. The Judge did not tell us that we were to discriminate against Negroes or Mexicans or any other race; the Judge did not instruct us to put negroes on or leave them off." (R. 6.)

Commissioner Moser: "My duties were to select 12 men and several alternates to serve, and we were given instructions by Judge King not to discriminate in any way against

them the jury commissioners proceeded to select the members of the grand jury.

Commissioner Chandler testified:

> "During the course of our deliberations as Commissioners there was a conversation with reference to selecting negroes on the Grand Jury Panel; it was discussed in the jury room among we Commissioners that an effort had been made to secure a negro for the Grand Jury; there was an effort made by the other Grand Jury Commissioners. There had been several efforts made to secure negroes and this was discussed among the Members of the Commission." (R. 7.)

> "No studied or passive effort was made by that Grand Jury Commission to keep a negro from serving on the October Grand Jury." (R. 7.)

> "The reason I did not submit a negro's name was *not* because of his color, or race, or previous condition of servitude in any sense of the word." (R. 7.)

Commissioner Moser testified:

> "I know some negroes that might be qualified for Grand Jury Service. I selected a negro but

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any race, creed or anything of that kind, and that we were to select these men with an open mind." (R. 8.)

Commissioner McLain: "The Court pointed out to us what the qualifications were for the grand jury; he told us that we were not to discriminate because of any race, color, or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against anyone because of race color or creed." (R. 10.)

I could not get him for this service because he could not serve. I selected 6 reputable men but I did not select a negro." (R. 8.)

"I know negro yardmen, negro doctors, and principals of the negro High School; that is who I tried to get on the jury; I called up the Principal of the Lincoln High School in South Dallas and I asked him if he would serve on the Grand Jury; he said that he would be glad to but that his time belonged to the City Schools and I was to call his boss, Mr. W. T. White, Superintendent of Dallas Schools; I was unable to get Mr. White when I called him twice because they are very busy in October; finally through his Secretary I was told that he just could not spare his Principals during that time. The Principal of Lincoln High School, Melvin, is a negro. This was just about the beginning of the school year.

"There was absolutely no studied or passive effort to discriminate against negroes on this Grand Jury Panel; they took themselves off when we tried to put them on. The reason that a negro was not put on this Grand Jury Panel was not because I had not made an effort to secure one; that is the only reason, as far as I was concerned." (R. 8-9.)

"I know a lot of negroes that are qualified lawyers, doctors, Superintendents of Schools and that sort of thing, but the particular thing is that their occupation precludes their serving. You could not ask a doctor or lawyer to serve 3 months of their time, either white or colored; that limited us as to the number that we could select." (R. 9.)

Commissioner McLain testified:

"The court pointed out to us what the qualifications were for the Grand Jury, he told us to select men who met those qualifications; he told us that we were not to discriminate because of any race, color or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against any one because of race, color or creed. I know definitely and positively that we did not discriminate; we selected the Grand Jury on the basis of qualification and no other basis. I don't know whether there were any Jews or Catholics on that grand jury; I assume there were some Protestants . . . " (R. 10.)

"Mr. Moser tried to contact a negro over the telephone to get him to serve on Grand Jury; as far as I know Mr. Moser did not get the permission to submit the name of that man; I don't remember the negro's name but he was Principal of the Negro High School here. Mr. Moser put the negro's name in and he discussed his qualifications and said that he would recommend him, and Mr. Chandler and I agreed that we would be agreeable to join with him in his recommendation, if Mr. Moser could procure him."

"I found that some people who were qualified could not serve for various reasons; I had one man whose hearing wasn't so good; another man was going to leave town; It is necessary and advisable to get people not only qualified but who can serve. Some people that I approached said, they could not give one-half a day, 5 days a week for 3 months, so, it was necessary to get people that could serve."

"If the name of any qualified negro citizen—been submitted at that time, who had given his permission and said he had time to serve, I certainly would have submitted his name along with the other 15 names, if it was somebody that would have been acceptable to me. With reference to there being any studied or any obvious or intentional effort made by the Commissioners to keep a negro from serving on the Grand Jury, I will say that there was absolutely no such effort made." (R. 10-11.)

With regard to this testimony by the Jury Commissioners, the Court of Criminal Appeals stated:

"The jury commissioners, who drew the list of grand jurors from which the grand jury that returned the indictment against appellant, appear to have contacted members of the Negro race who they thought possessed the qualifications of grand jurors, with a view of having them serve on the grand jury, and refrained from placing them on the grand jury, at their request. While it is true the jury commissioners were not clothed with the authority to pass upon excuses of those eligible for grand jury service, yet it appears to us that this conduct on the part of the jury commissioners fortifies and supports them in their position that they did not discriminate against members of the Negro race in drawing the grand jury that returned the instant indictment.

"Believing that appellant has failed to show race discrimination in the organization of the grand jury, as alleged, his motion for rehearing is overruled." (216 S. W. 2d 813, 819.)

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A mixed jury in each case is not required by the equal protection clause of the Fourteenth Amendment. It requires only that there be no intentional and systematic exclusion of Negroes from grand jury service solely because of race. Systematic exclusion may be shown by a long-continued exclusion of Negroes from grand jury service. Under the decisions of this Court as applied to the facts in this case, there has been no such intentional and systematic exclusion.

The facts of this case can best be understood with reference to the Fourteenth Amendment by a brief review of the cases of a similar nature. An examination of the cases will show that the trial in this case was conscientiously carried out with particular emphasis on the decision of this Court. These prior cases will, therefore, be briefly set out. Emphasis is added throughout.

Cases Decided Soon After the War Between the States

Three cases were decided by this Court in 1879 which laid down basic principles. In *Strauder v. West Virginia*, 100 U.S. 303 (1879) the State's statute provided that no Negro was eligible to be a member of the grand or petit jury. The statute was held to constitute State action and to deny the Negro defendant the equal protection of the laws as required by the Fourteenth Amendment. It was declared to be unconstitutional. The opinion further stated, however,

> "It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, *all persons* of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury."[10]

Immediately following the *Strauder* case is *Virginia v. Rives*, 100 U.S. 313 (1879). Negroes indicted in a State Court sought removal to the Federal Court because there were no Negroes on the grand jury which indicted them or on the petit jury which had been summoned to try them. They contended that based on their relative population they were entitled to a jury composed one-third of Negroes. This Court held that the case was not removable since the statute did not exclude Negroes from jury service. This Court could not presume that the Negroes would not receive equal protection of the laws in the State Court. The Court held that there could be no discrimination in the selection of jurors based solely on race. The opinion states, at page 323:

> ". . . But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz., a right to have the jury composed in part of colored men. A

[10]The *Strauder* case was followed in *Bush v. Kentucky*, 107 U. S. 110 (1882) where the grand jury indicting the Negro was selected under a statute which limited membership on the grand jury to white men.

mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment, or within the purview of sect. 641."

Following these cases was *Ex Parte Virginia*, 100 U.S. 339 (1879). A State Court Judge was arrested for impounding a jury upon which there were no Negroes in violation of an Act of Congress. His application for habeas corpus was denied by this Court.

In *Neal v. Delaware*, 103 U.S. 370 (1880), the facts showed that Negroes had always been excluded from grand and petit jury service. Those facts were held to raise a violent presumption that the State had been and was practicing discrimination. They presented a *prima facie* case which the State, having introduced no evidence, did not overcome. In reversing the case the Court summarized the holdings of the previous cases:

". . . while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' "

Later Cases Where No Negro Served on Grand Jury Over a Long Period of Time

Following the above cases there are several opinions by this Court cited by Petitioner, where the facts showed that for a very long period of time no Negro, or extremely few Negroes, served on grand juries in criminal cases involving life, liberty, or property of Negro citizens. Where the point was properly raised and supported by proof, the cases were reversed.[11] They are to be briefly alluded to to show the continuity of the decisions, and to emphasize their distinction from the facts of the cause under consideration.

Carter v. Texas, 177 U.S. 442 (1900). No Negro had ever served on the grand jury in Galveston County, Texas. The Trial Court refused to hear tendered evidence on the Negro's motion to quash the indictment.

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[11]There are cases of the same nature where a different result was reached. For example, in *Martin v. Texas*, 200 U.S. 316 (1906), the conviction of the Negro was affirmed where he introduced no proof to support his motion to quash for alleged discrimination. It cannot be presumed that State officers will not perform their duties; allegations and affidavits are not sufficient where discrimination is denied. To the same effect are *Smith v. Mississippi*, 162 U.S. 592 (1896); *Williams v. Mississippi*, 170 U. S. 213 (1898); *Tarrance v. Florida*, 188 U.S. 519 (1903); and *Franklin v. South Carolina*, 218 U.S. 161 (1910). And in *In Re Wood*, 140 U. S. 278 (1891), it was held that if a Negro did not raise the point before or during the trial, he could not raise it for the first time on writ of habeas corpus. Similarly, in *Gibson v. Mississippi*, 162 U.S. 565, 584 (1896) the conviction of a Negro was affirmed because there was no motion presented to quash the indictment.

Rogers v. Alabama, 192 U.S. 226 (1904). The State Court refused to consider the Negro's motion to quash or to hear evidence that no Negro had served on any jury in the county for 10 years. In reversing the case, this Court said:

> ". . . Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, *all persons* of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. . . ."

Norris v. Alabama, 294 U.S. 587 (1935). No Negro had served in that county within the memory of any of the witnesses (a generation or longer). The facts made a *prima facie* case of discrimination which the State did not rebut.

Hollins v. Oklahoma, 295 U.S. 394 (1935), is a *per curiam* opinion following *Neal v. Delaware* and *Norris v. Alabama, supra.*

Hale v. Kentucky, 303 U.S. 613 (1938). No Negro had served on the grand jury or petit jury in the county for 30 years. Reversed.

Pierre v. Louisiana, 306 U.S. 354 (1939). No Negro had ever been selected for grand jury service in that parish within the memory of any of the witnesses. Over a forty-year period, the names of only three Negroes, one of whom was then dead, had been listed for jury service. Only one Negro had ever

been called for jury service. The State offered no evidence to the contrary. This Court held that the testimony created a strong *prima facie* showing that Negroes had been systematically excluded because of race from grand jury service, and that the State failed to rebut the presumption.

There are two recent cases in this line of decisions:

Patton v. Mississippi, 332 U.S. 463 (1948). No Negro had served on the grand or petit criminal court juries in the county for thirty years or more. The Court, speaking through Mr. Justice Black, said:

> "We hold that the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County. When a jury selection plan, whatever it is, operates in such way as always to result in the *complete and long-continued exclusion of any representative at all from a large group of negroes*, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand. . . ."

Brunson v. North Carolina, 333 U.S. 851 (1948). The actual facts of this case are not given in any opinion. This Court's opinion and the opinion of the Supreme Court of North Carolina, 227 N. C. 558, 43 S. E. 2d 82, are *Per Curiam*. But from the briefs filed in this Court in that case it appears that in a community composed 45 per cent of Negroes, only 12 of 4,087 persons who had served on juries in the county in the ten years preceding the trial were Negroes.

Some witnesses placed the number of Negroes as low as 4 for that ten-year period. No Negroes had served on the grand jury in the entire year in which Brunson was charged. Names of Negroes eligible for jury duty were kept on a separate list from the general list. It is clear that the facts in the *Brunson* case were different from *Koritz v. State*, its companion case, in which an opinion was written by the North Carolina Supreme Court. 227 N. C. 552, 43 S. E. 2d 77 (1947).[12]

The Texas Cases

The following are the Texas cases which have been decided by this Court. Their development will show that the Trial Court in the case at bar made a studied effort to follow the decisions of this Court.

As set out above, one of the early landmark cases is *Carter v. Texas*, 177 U.S. 442 (1900). This Court there held that the grand jury system as practiced in Galveston County was in violation of the equal protection clause of the Fourteenth Amendment. It was there shown that no Negro had ever served.

The next Texas case was *Martin v. Texas*, 200 U.S. 316 (1906). In that case the conviction of the Negro was upheld because no evidence was introduced to show discrimination. In the Trial Court

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[12]The North Carolina Court, *per curiam*, in the *Brunson* case simply wrote that the *Brunson* case was controlled by its ruling in *State v. Koritz*, 227 N. C. 558, 43 S. E. 2d 82. This Court in the *Brunson* case simply wrote *per curiam* (omitting citations): "Reversed." The citations given were to cases of proven discrimination against Negroes on grand juries.

the attorney for the Negro had moved to quash the indictment on the ground that there was no Negro on the grand jury in Tarrant County (Fort Worth), but he introduced no proof. It was held that his motion unsupported by evidence was insufficient. The Court stated that "whether such discrimination was practiced in this case could have been manifested only by proof overcoming the denial on the part of the State. . . ."

In *Thomas v. Texas*, 212 U.S. 278 (1909) a motion to quash the grand jury indictment was made because the grand jury was composed "almost exclusively of white persons, and having not to exceed one negro . . . upon said jury. . . ." One Negro did serve on the grand jury, but none served on the petit jury. This Court held, following *Martin v. Texas*, that discrimination cannot be established by merely proving that no one of defendant's race was on the jury. It held that an accused cannot demand a mixed jury, and that a mixed jury is not guaranteed by the Fourteenth Amendment to any race.

In affirming the judgment of conviction, this Court, through Mr. Chief Justice Fuller, said:

> "As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on

the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit juries. Indeed, there was a negro juror on the grand jury which indicted plaintiff in error, and there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box. The court said:

" 'It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case, still this would not be evidence of discrimination. *If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated.* We understand the rule to be that mere error in administering the criminal law of the State, or in the conduct of a criminal trial, no Federal right being invaded or denied, is beyond the revisory power of the Supreme Court of the United States under the Constitution and the statutes regulating its jurisdiction.' "

Smith v. Texas, 311 U.S. 128 (1940) was the next Texas case. It arose in Harris County (Houston). After *Martin v. Texas, supra*, the names of Negroes were included in those to be called for grand jury service. But from 1931 to 1938 only 5 of 384 grand jurors who *served* were Negroes; that of 512 persons *summoned*, only 18 were Negroes; that of the

18, the names of 13 appeared as the last names on the 16-man jury list, the custom being to select the 12-man grand jury in the order that the names appeared on the list; that of the 5 Negroes who served, the same one served three times so that only 3 individual Negroes ever served; that there was no Negro on any of the grand juries in 1937 and none in 1938 when the defendant was indicted. While recognizing that discrimination was a queston of fact, this Court decided that "chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes. . . . Nor could chance and accident have been responsible for the combination of circumstances under which a Negro's name, when listed at all, almost invariably appeared as number 16."

Hill v. Texas, from Dallas County (Dallas) was handed down shortly after *Smith v. Texas.* 316 U.S. 400 (1942). The evidence there showed that no Negro had served on a Dallas County grand jury for the sixteen years prior to Hill's indictment. Following *Smith v. Texas* and *Neal v. Delaware*, *supra*, the conviction was reversed.

Akins v. Texas

Before the holding of this Court in *Hill v. Texas* in 1942, Akens, a Negro, was indicted in Dallas County for murder. He made a motion to quash the indictment on grounds similar to those in the *Hill* case: that no Negro had ever been drawn and served on the grand jury in Dallas County. He received a sentence of life imprisonment. The case reached

the Texas Court of Criminal Appeals (the State's highest Court in criminal matters) after the decision in *Hill v. Texas*, 145 Tex. Crim. 289, 167 S. W. 2d 758 (1943). The Texas Court of Criminal Appeals reversed the *Akens* case because of this Court's opinion in *Hill v. Texas*. The Texas Court of Criminal Appeals wrote:

> "The main question presented herein is practically the same as was offered in the case of Hill v. State . . . which was reversed by the Supreme Court of the United States, . . . That court held that similar testimony evidenced a deliberate discrimination in the selection of grand jurors for many years upon the part of the judges of the district courts of Dallas County, and their jury commissioners for many years, and disregarding the testimony of such judges and commissioners such court reversed the cause, and virtually held the indictment therein to be void. . . ." 167 S. W. 2d at 759.

> ". . . Regardless of what our views may be, the Supreme Court of the Nation has said that the continued failure to find men of color whose characteristics are sufficiently strong to convince one that they are of grand jury calibre is an irrefutable evidence of discrimination against them because of their color alone. See the Hill case, supra. As in duty bound, we find ourselves in the position of ordering a reversal of this cause on account of what that court says is deliberate discrimination against appellant because of the color of his skin." 167 S. W. 2d at 760.

When the case was retried, Akins[13] received a death sentence. The judgment was affirmed by the Texas Court of Criminal Appeals. 148 Tex. Crim. 523, 182 S. W. 2d 723 (1944).

This Court reviewed the evidence of the second indictment and trial in detail in *Akins v. Texas*, 325 U.S. 398. It showed that one Negro did serve on the grand jury which indicted Akins. Akins contended, however, that it was error to limit the number of Negroes on the grand jury to one. In the interest of brevity that testimony will not be set out at length. But it is directly in point. An examination of the facts in the case at bar and of the *Akins* case will show that precisely the same procedure was followed in this case as was followed in the *Akins* case. In the *Akins* case the trial judge instructed the jury commissioners that there should be no discrimination against Negroes in the selection of a grand jury. The grand jury commissioners were familiar with this Court's rulings. One Negro was selected for the grand jury and he served. The commissioners testified that they intended to put one Negro on the grand jury.

The Trial Court overruled the motion to quash. The ruling carried the implied finding that no discrimination was in fact practiced. The Texas Court of Criminal Appeals found that no discrimination was shown. *Akins v. State*, 148 Tex. Crim. 523, 182 S. W. (2d) 723. As will be more fully discussed later, this Court recognized that whether there had been any discrimination or not was an issue of fact:

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[13]The spelling of *Akens* was changed to *Akins* in the official reports.

"... the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, ... we accord in that examination great respect to the conclusions of the state judiciary ... That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process,' ..., or equal protection." 352 U. S. 402.

This Court concluded:

"... As one member of the Negro race served upon the grand jury which indicted petitioner and one had appeared upon the other grand jury list which had been selected after the decision in Hill v. Texas, we cannot say that the omission from each of the two lists of all but one of the members of a race which composed some fifteen per cent of the population alone proved racial discrimination." 325 U. S. at 405.

"A careful examination of these statements in connection with all the other evidence leaves us unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list. The judge who heard the witnesses on the motion to quash

did not find that type of discrimination. The law of their state, the instructions of the judge, their oath of office required them to choose prospective jurors on their statutory qualifications and without regard to their color or the number of representatives of various races who might appear upon the list. We cannot say the commissioners violated these obligations." 325 U. S. at 407.

The holding of the *Akins* case has recently been affirmed in *Zimmerman v. Maryland*, 336 U. S. 901. (Jan. 1949). This Court simply wrote "The Judgment is affirmed. *Akins v. Texas*, 325 U. S. 398 (1945)." The opinion affirmed is reported in 59 A. 2d. 675 (1948).

A Mixed Jury in a Particular Case Is Not Essential to the Equal Protection of the Laws

Beginning with the very earliest cases after the War Between the States, it has been the uniform holding of this Court that a mixed jury in a particular case is not essential to the equal protection of the law and it is not guaranteed by the Fourteenth Amendment. Pertinent quotations from opinions of this Court are set out in the footnote in the interest of brevity.[14]

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[14] *Strauder v. West Virginia*, 100 U.S. 303, 305: ". . . The first of these questions is not whether a colored man . . . has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether . . . all persons of his race or color may be excluded by law, solely because of their race . . ."

Virginia v. Rives, 100 U.S. 313, 323: "A mixed jury in a particular case is not essential to the equal protection of the laws . . ." (Continued on page 26.)

This principle has been applied in many different fact situations. Thus in *Ruthenberg v. United States*, 245 U. S. 480 (1918) a Socialist on trial for draft evasion complained because the grand and petit juries were composed exclusively of members of other political parties. The contention was overruled.

On the same proposition, the special or "blue-ribbon" grand jury system of New York was upheld. *Fay v. New York*, 332 U. S. 261 (1947). The contention was there made by the defendant labor union

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Neal v. Delaware, 103 U.S. 370, 394: "We repeat what we said in that (*Virginia v. Rives*) case, that while a colored citizen . . . cannot claim . . . that his race shall have a representation on the jury, and while a mixed jury, in a particular case is not within the meaning of the Constitution, always or absolutely necessary . . ."

Bush v. Kentucky, 107 U. S. 110, 117: "It may have been true that only white citizens were selected and summoned, yet it would not necessarily follow that the officer had violated the law and the special instruction given by the court 'to proceed in his selection without regard to race, color, or previous condition of servitude.' There was no legal right in the accused to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color*. . . ."

Martin v. Texas, 200 U. S. 316, 320: "A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. . . ."

Snowden v. Hughes, 321 U. S. 1, 8: ". . . But a discriminatory purpose is not presumed . . .; there must be a showing of 'clear and intentional discrimination' . . . But a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race."

official that the selection of the grand jurors was unfairly narrowed against laborers.[15] Mr. Justice Jackson wrote at page 284:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and *in nearly all cases it has veen shown to have persisted over many years. Virginia v. Rives*, 100 U. S. 313, 322-23; *Martin v. Texas*, 200 U. S. 316, 320-21; *Thomas v. Texas*, 212 U. S. 278, 282; *Smith v. Texas*, 311 U. S. 128; *Hill v. Texas*, 316 U. S. 400; *Akins v. Texas*, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. *Tarrance v. Florida*, 188 U. S. 519; *Martin v. Texas*, 200 U. S. 316; *Norris v. Alabama*, 294 U. S. 587; *Snowden v. Hughes*, 321 U. S. 1, 8-9; *Akins v. Texas*, 325 U. S. 398, 400."

The Court continued, page 291:

> "Even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. *Akins v. Texas*, 325 U. S. 398 . . . ."

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[15]Compare the earlier case of *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) where the evidence showed that "the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury list *all* persons who work for a daily wage." 328 U.S. at 221. The case involved a Federal Court jury and was reversed by a divided Court.

Moore v. New York, 333 U. S. 565 (1948) followed Fay v. New York, *supra*. The *Moore* case also involved the "blue-ribbon " jury. But a particular complaint was made to the fact that there was no Negro on the grand jury which indicted the defendant.

It was contended that Negroes were intentionally and systematically excluded. There were in fact no Negroes on the grand jury. There were no Negroes on the panel of 150 persons. The Court held that the fact that there was no Negro on the particular grand jury did not invalidate the indictment. The only question was whether there had been intentional and systematic exclusion of Negroes because of their race. The Court found there had been none.

This principle was followed in *Frazier v. United States*, 335 U. S. 497, 69 S. Ct. 201 (1948). In that case, in which a jury composed of Federal employees was upheld, this Court wrote "There is . . . no right to any particular composition or group representation on the jury."

This matter was discussed at length in *Akins v. Texas*, 325 U. S. 398 (1945) where the facts involved the Court from the same county as is involved in this case and where the system used was and is the same as was used in the *Akins* case. In that case Mr. Justice Reed wrote at page 403:

> ". . . Fairness in selection has never been held to require proportional representation of races upon a jury . . . Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible

individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds' . . . *Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized* . . . The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination . . ."

Whether Discrimination Was Practiced Is a Question of Fact. The Determination of the Issue by the State Court Is Controlling Unless the Decision Constitutes Such an Abuse as to Amount to an Infraction of the Federal Constitution

In *Thomas v. Texas*, 212 U. S. 278 (1909) a Negro's motion to quash his indictment for alleged discrimination was overruled after the introduction of evidence. His conviction was affirmed by the

Texas Appellate Court. In affirming the conviction, this Court wrote:

> "As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors." 212 U. S. at 282.

The rule was recently re-announced by this Court in *Akins v. Texas*, 325 U. S. 398, at page 401:

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amend-

ment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect . . . we accord in that examination great respect to the conclusions of the state judiciary . . . That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process', . . . or equal protection . . . .

"The regular statutory practice for the selection of grand jurors was followed in this case. Under the Texas statutes jury commissioners appointed by the judge of the trial court select a list of sixteen grand-jurymen from which list twelve are chosen as a grand jury. Texas Code of Criminal Procedure, Articles 333, 337. Qualifications for grand-jurymen are set out in Article 339. The Commissioners are instructed by the court as to their duties. Art. 366. This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this Court. *Smith v. Texas*, 311 U. S. 128, 130. Petitioner does not attack it now. Its alternative would be a list composed of all eligibles within the trial court's jurisdiction and selection of the panel by lot.

". . . Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized . . . The mere fact of inequality in the number selected does not in itself show dis-

crimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such extent as to show intentional discrimination . . ."

". . . we cannot say that the omission from each of the two lists of all but one of the members of a race which composed some fifteen per cent of the population alone proved racial discrimination." 325 U. S. at 405.

". . . The judge who heard the witnesses on the motion to quash did not find that type of discrimination. The law of their state, the instructions of the judge, their oath of office required them to choose prospective jurors on their statutory qualifications and without regard to their color or the number of representatives of various races who might appear upon the list. We cannot say the commissioners violated these obligations." 325 U. S. at 407.

ARGUMENT

The authorities above demonstrate that it has been the uniform holding of this Court that the absence of a Negro from any particular grand jury (including the one in question) does not invalidate an indictment. A mixed jury in each case is not required by the Fourteenth Amendment. *Moore v. New York* and other cases cited, pages 25 to 29 herein. It is the system or manner of selection of grand juries, generally over a long period of time

that is locked to in order to determine whether there has been a denial of "equal protection."

Petitioner's motion to quash (set out in note 2 on page 2 hereof) makes the point only that no Negro was selected for the grand jury which indicted him. Such an allegation does not raise the Federal question and is insufficient to invalidate the indictment even if his allegations were taken as true.

But assuming that the point is raised that over a period of time there has been an intentional and systematic exclusion of Negroes from grand jury service in Dallas County solely because of their race, it is submitted that this case has been correctly decided.

The system for selection of grand juries used in this case was the same as it was when this Court considered and passed upon *Akins v. Texas*. The cause arose from the same county in Texas. Dallas County and its grand jury system was before this Court the first time in *Hill v. Texas*. Upon a finding of discriminatory practices in the *Hill* case, it was reversed. That was in 1942. Dallas County thereupon set out to carry out the mandate of this Court. As explained by this Court in the *Akins* opinion, Dallas County selects four grand juries a year, each serving for three months. The table below lists the Negroes who have actually served on the grand juries from the time of the *Hill* case down to and including the indictment of Petitioner. The figures on those *called* for service are not available. Also interpolated are the dates on the cases reaching this Court:

June 1. 1942	*Hill v. Texas* decided by this Court
October, 1942 Grand Jury	John King (R. 22, 24, 25)
January, 1943 Grand Jury	Charles D. Johnson (R. 14, 18, 22, 24, 25)
February 5, 1943	L. C. Akins indicted for murder
April, 1943 Grand Jury	W. J. Sheppard (R. 18, 22, 24, 25)
July, 1943 Grand Jury	T. W. Pratt (R. 14, 18, 22, 24, 25)
October, 1943 Grand Jury	None
January, 1944 Grand Jury	C. A. Walton (R. 14, 18, 22, 24, 25)
April, 1944 Grand Jury	Bonnie Johnson (R. 18, 22, 24, 25)
July, 1944 Grand Jury	William McShann (R. 14, 18, 22, 24, 25)
October 1944 Grand Jury	Vernie Flowers (R. 18, 22, 24, 26)
January, 1945 Grand Jury	LaFayette M. Turley (R. 14, 18, 22, 24, 26)
April, 1945 Grand Jury	Milton Grace (R. 18, 22, 24, 26)
June 4, 1945	*Akins v. Texas* decided by this Court
July, 1945 Grand Jury	W. Barton Beatty, Jr. (R. 14, 18, 22, 24, 26)
October, 1945 Grand Jury	Clarence F. Starks (R. 14, 18, 22, 24, 26)
January, 1946 Grand Jury	Wheeler Hardaway (R. 18, 22, 24)
April, 1946 Grand Jury	None
July, 1946 Grand Jury	Joe Dedies (R. 14, 19, 22, 24)
October, 1946 Grand Jury[16]	James Dixon (R. 19, 23)
January, 1947 Grand Jury	Travis Clark (R. 14, 18, 21, 23)
April, 1947 Grand Jury	None
July, 1947 Grand Jury	Sam Hudson, Jr. (R. 14, 21, 23)
October, 1947 Grand Jury	None
November 18, 1947	Lee Cassell indicted

[16]See Note 8 *supra* page 6.

And it will be remembered that a Negro was contacted for service on the October, 1947 grand jury. He did not serve because his employer could not dispense with his services for the four months' period. (R. 9.)

STATISTICS

Petitioner on pages 7 and 8 of his brief sets out a group of statistics. This Court, through its opinions, has indicated an interest in statistics showing the ratio of the white and Negro population and the proportional representation on grand juries. Current statistics are not available because the last Federal Census was taken in 1940. But it is believed that the following statistics demonstrate that there has been no intentional and systematic exclusion of Negroes from grand jury service because of their race.

The qualifications for service on grand juries are: (1) compliance with the requirements for voting;[17] (2) some manner of property holding; (3) a sound mind and good moral character; (4) ability to read and write; (5) the absence of a conviction of a

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[17]Article 339 (1) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48 provides that in order for a citizen to serve as a grand juror he must be "qualified under the Constitution and laws to vote in said County." A poll tax is required in Texas as a qualification for voting. Texas Constitution, Art. VI, Sec. 2; Texas Civil Statutes (Vernon, 1948), Art. 2955. A constitutional amendment to abolish the poll tax as a prerequisite of voting will be submitted to Texas voters on November 8, 1949. S.J.R. 4, General Laws of Texas, 1949, pages i, ix.

felony; and (6) no legal accusation for theft or any felony.[18] Only men are eligible for such service.[19] The number of persons in any one group who possess certain of these qualifications is susceptible of proof or approximation by the use of available statistics.

In 1940[20] the total population of Dallas County was 398, 564. Of that total, 336,851 were white and 61,605 were Negroes. So approximately 15.5 per cent of the total population of Dallas County were Negroes according to the last census. But only approximately 7.44 per cent of those are male. The total male population was 191,453, or 48 per cent, and the female population was 207,111, or 52 per cent. The testimony of the Secretary of the Progressive Voters' League is to the effect that "there are some 5,500 colored Poll Tax payers in Dallas County." (R. 13). The approximate number of male holders of poll tax receipts would be 48 per cent of this number, or 2,640. The total number of poll tax receipts issued in Dallas County during 1946, these receipts to be used for election purposes during 1947, was 83,667. [21] Although there is no official

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[18]Texas Code of Criminal Procedure (Vernon, 1948), Article 339, Appendix page 48.

[19]Women may not serve upon either grand or petit juries in Texas. Texas Constitution, Art. 3, Sec. 13; Tex. Code Crim. Proc. (Vernon, 1948) Arts. 338, 349; *Harper v. State*, 90 Tex. Crim. 252, 234 S. W. 909 (1921). A constitutional amendment to remove this disqualification will be voted on by Texans at an election on Nov. 8, 1949, S.J.R. 2, General Laws of Texas, 1949, pages i, ix.

[20]Sixteenth Census of the United States: 1940, Population, Vol. II, Characteristics Of The Population, Part 6; Pennsylvania-Texas (U.S. Department of Commerce) pp. 795, 819. All figures used are taken from this source unless otherwise indicated.

[21]Texas Alamanac—1947-1948, pp. 420-422.

breakdown of the figure between males and females, 48 per cent of this latter number including all races would be 40,160. So the approximate total male holders of poll tax receipts was 40,160. Thus, assuming the same proportion among the races in the number of illiterates, the number of disqualifications because of indictment or conviction of crime, and in the percentage of householders or freeholders, 6.57 per cent of the persons eligible for grand jury service were Negroes, (there being 40,160 male poll tax holders of which 2,640 were Negroes).

This record shows that there were at least 17 Negroes who served on the last 21 grand juries in Dallas County (R. 14, 15, 18, 22-23, 25). They are listed on a page 34 hereof. Thus Negroes constituted 6.74 per cent of all the persons who have served on the grand juries in Dallas County since this Court decided the *Hill* case, including the grand jury which indicted Petitioner. So on the basis of the first qualification for service as a grand juror in Texas, the Negro citizens in Dallas County are represented in a percentage greater than (6.74) than the percentage of those eligible to serve (6.57).

Though current statistics are not available, the information available tends to demonstrate that a larger percentage of Negroes are otherwise disqualified under the remaining qualifications: (2) freeholder or householder;[22] (4) literacy;[23] and (5)

[22]Article 339 (2) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48, provides that a prospective grand juror "must be a freeholder within the State or a householder within the county."

[23]Article 339 (4) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48 provides that a prospective grand juror "must be able to read and write."

criminal records.[24] The statistics would materially reduce the 6.57 per cent of the Negroes eligible for service.

(1) The 1940 census shows that of 44,604 owner-occupied dwellings in Dallas County, the breakdown is 51,051 are white and 3,542 are Negro.[25] This reflects that many of those Negroes eligible as qualified voters would be ineligible because of the property requirement.

(2) On the basis of the 1930 census (the latest available count) this Court has stated in the *Hill* case that "7.5 per cent of the Negro population of the county" are illiterate.[26] This census also reveals that only .08 per cent of the white race, both native and foreign born, in Dallas County are illiterate.[27]

(3) Though Negroes compose only approximately 15.5 per cent of the Dallas County population, 28 per cent of those arrested were Negroes.[28] Thus it might be inferred that there are a large number of persons of the Negro race disqualified because of criminal records.[29] The records of the Federal Bureau of In-

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[24]Article 339(5) and (6) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48 provide that a prospective grand juror "must not have been convicted of any felony," and "must not be under indictment or other legal accusation for theft or of any felony."

[25]Sixteenth Census of the United States: 1940, Housing, Vol. II, General Characteristics, Part 5, Rhode Island-Wyoming (U.S. Department of Commerce) p. 320.

[26]*Hill v. Texas*, 316 U.S. 400, 403 (1942).

[27]Population Bulletin, Second Series, Texas, Composition and Characteristics of the Population, 15th Census. (U.S. Department of Commerce.)

[28]Based upon number of arrests in Dallas County for the last nine months of 1948. Statistics secured from the Texas Department of Public Safety, Bureau of Identification.

[29]*Ibid*, Note 24.

vestigation show 5,398 felony offenses in Dallas, Texas, in 1947 and 4,886 in 1948.[30] Assuming that 28 per cent of the offenders were Negroes, 1,511 Negroes were disqualified from grand jury service in 1947 and 1,368 in 1948.

Thus it can be seen that though Negro men constitute 7.44 per cent of the total population of Dallas County they are a much smaller percentage of that section of the population which is available for grand jury service. On the basis of the available statistics Negroes are represented on the Dallas County grand juries in a proportion greater than the proportional amount of Negroes among those qualified.

"Intentional" Exclusion

This Court has held that the exclusion in question must be "intentional and systematic."[31] The

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[30]Uniform Crime Reports for the United States and its Possessions, Vol. XVIII, No. 2, Annual Bulletin, 1947, p. 98; Vol. XIX, No. 2, 1948, p. 97.

[31]"A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins v. Texas*, 325 U.S. 398, 403. Opinions of this Court use a variety of tests: "Intentional and systematic" is used in *Moore v. New York*, 333 U. S. 565, 568. "Systematic and intentional" was used by Mr. Justice Murphy in several opinions and dissents, e. g. *Thiel v. Southern Pacific*, 328 U.S. 217, 220; *Fay v. New York*, 328 U.S. 261, 297; *Moore v. New York, supra* at 570. "Purposefully and completely" is used in *Fay v. New York, supra* at 282. "Deliberately and systematically" is used in *Pierre v. Louisiana*, 306 U.S. 354, 357. "Purposefully" or "Purposeful" is used in *Akins v. Texas, supra*, at 403, and in *Snowden v. Hughes*, 321 U. S. 1 at 9. It is also "arbitrary and purposeful" in *Akins v. Texas, supra*, at 400,. and "systematic and arbitrary" in *Hale v. Kentucky*, 303 U. S. 613, 616.

question of intent or the purpose to discriminate is therefore material. The State introduced the testimony of the Trial Court and the three jury commissioners in this regard. If the Trial Court had an "intent" it was to follow the directions of this Court. After explaining that he had tried and was familiar with the *Hill* case (R. 16), he testified:

> "Prior and subsequent to the handing down of the opinion in the Hill Case, when I was charging Grand Juries I would tell them that there should not be any discrimination made on account of race, creed or color, or religion, and I particularly instructed them about the Hill case. As a matter of fact, I explained the Hill Case to them and told them about it.
>
> "I gave instructions to the Grand Jury Commissioners that selected the October Term, 1947, Grand Jury that indicted this Defendant, both individually and collectively, with reference to negroes serving on that Grand Jury." (R. 17.)

> ". . . The Commission did not fail to put a negro on that Grand Jury after my specific instructions; I never have instructed any Grand Jury Commission to put any negro on a Grand Jury, or a Catholic, or any religion, or a person of any nationality, even though they were American citizens; I have never instructed them to put anybody on there any more than never to tell them to put 'John Doe' on there; but I have told them what the case held in the Hill Case; I have always told them what the Constitution says with reference to discrimination against a person because of race, politics, religion or color. It is not my duty to tell them to put them on or not to put them on." (R. 17, 18.)

In a like manner, the jury commissioners testified that they did not discriminate against Negroes, intentionally or otherwise. Commissioner Moser testified:

". . . I know many people in Dallas of all races, creeds and colors, etc.

"On or about October 1st, 1947, I was called and I came to this court room to serve as a Grand Jury Commissioner to select a Grand Jury for the October, 1947, Term. My duties were to select 12 men and several alternates to serve, and we were given instructions by Judge King not to discriminate in any way against any race, creed or anything of that kind, and that we were to select these men with an open mind. That is what I did. . . .

"I know some negroes that might be qualified for Grand Jury Service. I selected a negro but I could not get him for this service because he could not serve. . . .

"Judge King told us when we were called down here that we should consider negroes as well as anybody else. He told us at least 3 times that we were not to be prejudiced against negroes and he said that it was not our duty to put a negro on, that he was not telling us that we had to and that it was up to us entirely; that applies to Mexicans and Italians as well.

"I know negro yardmen, negro doctors, and principals of the negro High School; that is who I tried to get on the jury; I called up the Principal of the Lincoln High School in South Dallas and I asked him if he would serve on the Grand Jury; he said that he would be glad to but that his time belonged to the City Schools and I was to call his boss, Mr. W. T. White, Superintendent of Dallas Schools; I was unable

to get Mr. White when I called him twice because they are very busy in October; finally through his Secretary I was told that he just could not spare his Principals during that time. The Principal of Lincoln High School, Melvin, is a negro. This was just about the beginning of the school year.

"There was absolutely no studied or passive effort to discriminate against negroes on this Grand Jury Panel; they took themselves off when we tried to put them on. The reason that a negro was not put on this Grand Jury Panel was not because I had not made an effort to secure one; that is the only reason, as far as I was concerned." (R. 7, 8, 9.)

Commissioner McLain testified:

"I know many people in Dallas that are qualified voters among all races and creeds. . . .

"The Court pointed out to us what the qualifications were for the Grand Jury, he told us to select men who met those qualifications; he told us that we were not to discriminate because of any race, color or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against any one because of race, color or creed. *I know definitely and positively that we did not discriminate;* we selected the Grand Jury on the basis of qualification and on no other basis. I don't know whether there were any Jews and Catholics on that Grand Jury; I assume that there were some Protestants because I know some of them."

"Mr. Moser tried to contact a negro over the telephone to get him to serve on Grand Jury; . . . Mr. Moser put this negro's name in and

he discussed his qualifications and said that he would recommend him, and Mr. Chandler and I agreed that we would be agreeable to join with him in his recommendation, if Mr. Moser could procure him.

". . . With reference to there being any studied or obvious or intention—effort made by the Commissioners to keep a negro from serving on the Grand Jury, I will say that there was absolutely no such effort made." (R. 10, 11.)

Commissioner Chandler testified:

"When I was called down to serve as Grand Jury Commissioner, I was instructed by Judge King that there was no racial discrimination, not that a negro could or couldn't be selected for the Grand Jury. The Judge did not tell us that we were to discriminate against negroes or Mexicans or any other race; the Judge did not instruct us to put negroes on or leave them off. Myself and the other 2 Commissioners were instructed to select 16 qualified men without reference to race or color or any other question like that.

". . . There had been several efforts made to secure negroes and this was discussed among the Members of the Commission. . . .

"No studied or passive effort was made by that Grand Jury Commission to keep a negro from serving on the October Grand Jury. . . ." (R. 6, 7.)

This testimony, some of it repeated because of its importance, indicates the complete lack of any intent to exclude or discriminate against Negroes in the

selection of the grand jury for the October Term, 1947. On the contrary, each of those charged with the duty of selection stated that he fulfilled his duties without any reference to race or color. The absence of intent to discriminate removes this case from any of the principles upon which this court has reversed cases involving discrimination in the selection of grand juries.[32]

Any inference of systematic exclusion over an extended period of time is dispelled by the fact that Negroes have served on 17 of the last 21 grand juries in Dallas County and that one was contacted in this case.

In overruling Petitioner's motion to quash the indictment in this cause, the Trial Court, after hearing all the witnesses presented, found that there was no discrimination practiced in the selection of the grand jury. The evidence and the opinions of this Court were carefully reviewed by the Texas Court of Criminal Appeals, both in its original opinion and on motion for rehearing, and the ruling of the Trial Court was affirmed. This Court has said that in examining the evidence to determine if a Federal Constitutional right has been denied, great respect will be accorded to the conclusions of the State judiciary. Cases cited pages 29 to 32 herein.

This record, it is submitted, shows no practice with regard to the selection of grand juries in Dallas County other than that of a conscientious effort by the authorities charged with the duty of organizing and impanelling grand juries to comply with the law as announced by this Court.

[32] *Ibid*, Note 31.

The facts and law of this case rest squarely on the *Akins* opinion of this Court. As written in *Moore v. New York:*

> ". . . not only is the record wanting in proof of intentional and systematic exclusion—the only witness sworn testified that there was no such practice or intent." 333 U. S. 565, 568.

CONCLUSION

It is respectfully submitted that this case should be affirmed.

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Dated November 3, 1949.

APPENDIX

Constitutional and Statutory Provisions of Texas Providing the Method for the Selection of Grand Juries

Constitutional Provisions

Article V Section 13: "Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Article XVI Section 19: "The Legislature shall prescribe by law the qualification of grand and petit jurors."

Statutory Provisions[1]

Article 333: "The district judge shall, at each term of the district court, appoint three persons to perform the duties of jury commissioners, who shall possess the following qualifications:

[1]Texas Code of Criminal Procedure (Vernon, 1948).

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said court which requires the intervention of a jury."

Article 335: "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged.' "

Article 336: "The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county."

Article 338: "The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court."

Article 339: "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 340: "The names of those selected as grand jurors by the commissioners shall be written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, 'The list of grand jurors selected at ..... term of the district court,' the blank being for the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court."

Article 344: "Within thirty days of the next term of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal and deliver it to the sheriff."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 46

LEE CASSELL, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

SUPPLEMENTAL BRIEF FOR THE STATE OF TEXAS, RESPONDENT

PRICE DANIEL
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On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

SUPPLEMENTAL BRIEF FOR THE STATE OF TEXAS, RESPONDENT

Pursuant to request made in open court during oral argument of the above-styled cause, the State of Texas files this, its supplemental brief.

Petitioner contends that this record shows that no Negroes were summoned for grand jury service and not impanelled on the grand jury or excused by the Court in those instances where no Negro served.[1] It is submitted that there is nothing in the record

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[1]These grand juries are shown to be October, 1943, April, 1946, April and October, 1947. Brief Of The State of Texas, p. 34.

here which would support such a contention, nor is there any "invariable pattern" shown.[2]

This Court may judicially notice *Weems v. State*, 148 Tex. Crim. 154, 185 S. W. 2d 431 (1945). An indictment for murder against a Negro by the October, 1943 grand jury of Dallas County, one of those upon which no Negro served, was involved in that case. The defendant there moved to quash the indictment because "no negro or member of the African race was selected and impanelled in said grand jury." The facts were stipulated as follows:

> "That defendant is a negro, a member of the African race. That he was indicted at the October Term, 1943, of this court, by the grand jury impanelled at that time. That the grand jury panel was drawn for that term consisting of sixteen men, as provided by law, and that the last man on the list, Jackson Taft, was a negro, the first fifteen were white men. That in impanelling the grand jury the ninth man on the grand jury panel, to-wit, J. H. Colwell, was excused for some cause, and that the first thirteen names less the name of Colwell, to and including the name of B. L. Morrison, was impaneled as the grand jury for that term, and that the negro, Jackson Taft, was not impaneled, and he did not offer any excuse of disqualification, but his name was not reached on the grand jury panel in impaneling the twelve men of the grand jury for that term."

It is thus shown that on at least one of those grand juries upon which no Negro served (October, 1943)

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[2]Brief For Petitioner, Lee Cassell, p. 12.

there was a Negro summoned for service and not impanelled. It follows that Petitioner's contention of "an invariable pattern" is not tenable since from judicial notice alone it can be shown that Negroes were called for at least one grand jury upon which none were impanelled. The record shows only those Negroes who actually served on the grand jury. It does not show the names of all sixteen men on the panel from which the grand jury was selected.

Petitioner and Respondent take different views of the effect of the testimony of A. C. Partee, Executive Secretary of the Progressive Voters' League. (R. 12-14.) The witness testified at one time that "I would roughly estimate that the male adult voting strength of the negro race in Dallas County is about 5,500." (R. 13.) At another time he testified that "there are some 5,500 colored Poll Tax payers in Dallas County." (R. 13.) This latter statement was used by Respondent as a basis for the statistics it submitted to this Court to show the approximate number of Negroes eligible for service upon grand juries in Dallas County.[3]

In the Brief For The State of Texas at page 37, after computations based upon the 1940 census, the total number of poll tax receipts in Dallas County for 1947, as shown by the Texas Almanac, and the estimated male portion of the total Negro poll tax payers as testified by the witness Partee, it is shown that 6.57 per cent of the persons eligible for service on the grand juries in Dallas County in 1947 were

[3]Brief For The State of Texas, pp. 35-39.

Negroes. Petitioner contends that Respondent is in error, saying that the figure as to the total Negro male poll tax payers should be doubled. When this is done the number of eligible male Negroes becomes 13.14 per cent. Negroes constitute 15.5 per cent of the total population of Dallas County according to the 1940 Census.[4] Thus, although women constitute 52 per cent of this total, only 2.86 per cent of the total Negro poll tax payers could be women. This is obviously not the case and Negro men must be a lesser number of the Negro poll tax payers than 5,500.

Again, the census and the *Akins* case show that the proportion of Negroes in Dallas County was 15.5 per cent. That is all the Negroes: men, women, and children. Assuming half of the 15.5 per cent were men and all were eligible to serve, they would still have a percentage of eligibility of only 7.75 per cent (half of 15.5 per cent). But of course all of the Negro men were not eligible. The percentage of Negroes who actually served (6.57) is not very far from the absolute maximum which might serve (7.75) assuming all Negro males were eligible for grand jury service.

To show further that the witness intended his statement that 5,500 was the total number of Negro poll tax payers rather than the male poll tax payers, the 1940 census shows in Dallas County 19,133 male Negroes twenty-one years old or more.[5] By com-

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[4]Brief For The State of Texas, p. 36.

[5]Sixteenth Census of the United States: 1940, Population, Vol. II, Characteristics of The Population, Part 6; Pennsylvania-Texas (U.S. Department of Commerce), p. 818.

paring the total population of Dallas County to the total poll taxes paid, those paying are 20.9 per cent of the population. On this basis a total of not more than 3,998 Negro men would have paid their poll taxes in 1947. Again, in the light of this, the witness could not have meant that 5,500 was total males, but must have meant this, as he said later, as the total of both male and female.

These mathematical calculations are set out to show that Petitioner's view of the testimony of the Secretary of the Progressive Voters' League is mathematically improbable. This conclusion may be reached from a reading of the entire testimony of the witness without resort to the calculations. He testified that "I have never counted that list; I have approximated the names on that list." (R. 12.) The witness also testified that "the vote figure that I have is not broken down between men and women." (R. 13.)

Regarding this testimony, the Texas Court of Criminal Appeals stated:

> "The record before us reflects that there were 5,500 Negroes in Dallas County qualified to vote. But the qualification to vote is but one of the qualifications for grand jurors. Art. 339, C.C.P. It could hardly be said, then, that this record reflects there were 5,500 Negroes in Dallas County qualified for grand jury service." (216 S. W. 2d 813, 819.) (R. 32-33.)

The conclusion of the Court then, is the same as that of the Respondent.

Respectfully submitted,

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Dated November 18, 1948.

Copies hereof have been mailed to opposing counsel.